SUPREME COURT OF THE UNITED STATES.

No. 170.

THE PRESIDENT, MANAGERS, AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY, PLAINTIFFS IN ERROR,

vs.

THE PENNSYLVANIA COAL COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the Circuit Court of the United States for the southern district of New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you or some of you, between the President, Managers, and Company of the Delaware and Hudson Canal Company, plaintiffs, and The Pennsylvania Coal Company, defendants, a manifest error hath happened, to the great damage of the said The President, Managers, and Company of the Delaware and Hudson Canal Company, as it is said, and as appears by their said complaint, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held that the record

2 and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 3rd day of December, in the year of our Lord one thousand eight hundred and sixty-six.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the southern district of New York, in the second district.

3 SUPREME COURT OF THE UNITED STATES:

THE PRESIDENT, MANAGERS, AND COMPANY OF THE Delaware and Hudson Canal Company *vs.* THE PENNSYLVANIA COAL COMPANY. } In error.

Of December term, in the year of our Lord one thousand eight hundred and sixty-seven.

Afterwards, to wit, on tee first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the City of Washington, comes the said President, Managers, and Company of the Delaware and Hudson Canal Company, by Owen, Nash & Gray, their attorneys, and say that, in the record and proceedings aforesaid, there is manifest error in this, to wit: that, by the record aforesaid, it appears that the judgment

aforesaid was given for the said The Pennsylvania Coal Company against the said the President, Managers, and Company of the Delaware and Hudson Canal Company, whereas, by the law of the land, the said judgment ought to have been given for the said The
4 President, Managers, and Company of the Delaware and Hudson Canal Company against the said The Pennsylvania Coal Company, and the said The President, Managers, and Company of the Delaware and Hudson Canal Company pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by reason of the said judgment, &c.

OWEN, NASH & GRAY,
A'tys for Plaintiffs in error.

Endorsed: 321. Supreme Court of the United States. The President, Managers, and Company of the Delaware and Hudson Canal Company, plaintiffs in error, *vs.* The Pennsylvania Coal Company, def'ts in error. Assignment of general errors. Owen, Nash & Gray, att'ys for pl'ffs in error. Filed Dec'r 18th, '67.

5 Supreme Court of the United States.

THE PENNSYLVANIA COAL COMPANY, def'ts in error, *ads.*
THE PRESIDENT, MANAGERS, AND Company of the Delaware and Hudson Canal Company, plaintiffs in error.

And the said the Pennsylvania Coal Company, defendants in error, by Evarts, Southmayd & Choate, their attorneys, freely come here into court and say that there is no error in the record and proceedings aforesaid, or in giving the judgment aforesaid, and they pray that the court now here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

EVARTS, SOUTHMAYD & CHOATE,
Att'ys for Def'ts in error.

Endorsed: 321. Supreme Court of the United States. The Pennsylvania Coal Company *ads.* The President, Managers, and Company of the Delaware and Hudson Canal Company. Joinder in error. Evarts, Southmayd & Choate, att'ys. Filed Dec. 21st, 1867.

THE PRESIDENT, MANAGERS & CO. OF THE Delaware and Hudson Canal Co., pl'ffs in error.
v.
THE PENNSYLVANIA COAL COMPANY, DEF'T in error.

6 By virtue of the within writ of error, and in obedience thereto, I, Kenneth G. White, clerk of the Circuit Court of the

United States for the southern district of New York, do hereby certify and return the judgment and proceedings in the case in the writ within mentioned, and that the following pages numbered from three to eighty-four, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the above-entitled case as the same remains of record and on file in said office.

In testimony whereof, I have caused the seal of said court to be hereunto affixed, at the city of New York, in the southern dist. of New York, in the 2d circuit this 2d day of December, one thousand eight hundred and sixty-seven, and of the independence of the said United States the ninety-second.

[SEAL.] KENNETH G. WHITE, *Clerk*.

Endorsed: Supreme Court of the United States. The President, Managers, and Comp'y of or the Delaware and Hudson Canal Comp'y, pl'ffs in error, *vs.* The Pennsylvania Coal Company, def'ts in error. Writ of error. Owen, Nash & Gray, att'ys for pl'ffs in error, 62 Wall st., New York. Allowed, Nov. 14, 1867. Sam'l Blatchford, dist. judge. Filed Nov. 14, '6.

[5-ct. U. S. rev. stamp, cancelled.]

7 United States Circuit Court for the southern district of New York.—Second circuit.

Pleas before the Circuit Court of the United States for the southern district of New York, in the second circuit, at the city of New York, of April term, in the year one thousand eight hundred and sixty-six.

Witness·

Hon. SAMUEL NELSON, *Justice.*
KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss*:

Be it remembered, that heretofore, and on the tenth day of April, of April term, in the year one thousand eight hundred and sixty-five, before the Circuit Court of the United States for the southern district of New York, at the city of New York, came the President, Managers and Company of the Delaware and Hudson Canal Company, by Owen, Gray & Owen, their attorneys, and brought into the said court, before the aforesaid justice thereof, their certain declaration against the Pennsylvania Coal Company, in the words following, that is to say:

SOUTHERN DISTRICT OF NEW YORK, *ss*:

The Pennsylvania Coal Company were summoned to answer the President, Managers and Company of the Delaware and Hudson Canal Company, of a plea of breach of covenant, and thereupon the said President, Managers and Company of the Delaware and Hudson Canal Company, (the plaintiffs herein,) by Owen, Gray & Owen, their

attorneys, complain of the Pennsylvania Coal Company, defendants, being now by due appearance here in court. For that,
8 whereas the plaintiffs are a corporation, created under and by virtue of an act of the legislature of the State of New York, and the members of which are citizens of the State of New York, and the said defendants are a corporation, created under and by virtue of an act of the legislature of the State of Pennsylvania, and the members of which last-mentioned corporation are citizens of the State of Pennsylvania. And also for that, whereas the said plaintiffs, before and at the time of the making of the agreements hereinafter set forth, to wit, on the 31st day of August, 1847, at the city of New York, to wit, in the southern district aforesaid, under and by virtue of an act of the legislature of the State of New York, entitled "An act to incorporate the President, Managers and Company of the Deleware and Hudson Canal Company," passed April 23d, 1823; of an act of the legislature of the State of Pennsylvania, entitled "An act to improve the navigation of the river Lackawaxen," passed the 13th day of March, 1823, and of several other acts of the said legislature, supplemental thereto and amendatory thereof, had constructed and built, and had become and were the owners of a certain canal or slack water navigation, commonly known as the "Delaware and Hudson Canal," leading from and to certain points, to wit: from Eddyville, on the Rondout creek, in the county of Ulster and State of New York, where the waters of the said creek meet the tide water of the Hudson river, westward to the Delaware river, and after crossing the same, thence up along the river Lackawaxen to Honesdale, in the State of Pennsylvania, and had the right to demand and collect from the person or persons having charge of any boat or other vessel passing through the said canal, certain tolls for every ton weight of the ascertained burden or capacity of such boat or other vessel laden or engaged in the transportation of coal.

And whereas also the said plaintiffs afterwards, to wit, on the day and year, and at the place aforesaid, had become and were the owners of a large tract of coal lands situated in the interior of the State of Pennsylvania, and had constructed, built, and duly
9 equipped and put in operation a railroad from their said coal lands to and connecting with the said canal, at or near Honesdale, in the said State of Pennsylvania, and have ever since been, and still are, entitled to maintain the said canal and railroad, and to use the same for transportation of their own coal thereon, and to charge and collect tolls from persons navigating the said canal, as aforesaid, of all which the defendants, before and at the several times hereinafter mentioned, to wit, at the southern district of New York, had notice.

And whereas also the defendants, under and by virtue of several acts of the legislature of the State of Pennsylvania, had become and were the owners of other tracts of coal land, situated in the said State of Pennsylvania, which they had purchased with the view to the mining of coal therefrom, and of transporting to market and vending the same, and had acquired all the property, rights and interest of

"The Wyoming Coal Association," hereinafter mentioned, an association formed with a view to mining coal, and causing the same to be transported by railroad, connecting with the said canal of the plaintiffs, and had made and constructed a railroad from the coal lands of the said association to said canal.

And whereas also afterwards, to wit, at the time of the making of the said agreements hereinbefore mentioned, and hereinafter set forth, the most practicable outlet to market for the coal that should be mined from the region that comprised the coal lands of the plaintiffs, of the defendants of the association, was by the way of the plaintiffs' canal to tide water on the Hudson river, and such canal had been and was constructed, and the rights, privileges and franchises which had been granted to the plaintiffs by the legislature of the State of New York, as aforesaid, had been so granted with the view of opening a channel through which the city of New York, and other parts of the State of New York, might receive a supply of coal from said State of Pennsylvania, and the rights, privileges and franchises which had been granted by the State of Pennsylvania to the plaintiffs and the defendants had been and were also granted with the same design, and also to encourage the opening of coal mines, and the mining of coal in the State of Pennsylvania; and the said canal of the plaintiffs was the only avenue by which the said association or the defendants herein could transport their coal to market, and there was no other such avenue, either by railroad, canal or otherwise, then contemplated, of all which the defendants afterwards, to wit, on the day and year, and at the place aforesaid, had notice.

And whereas also at the time of the making of the agreements before mentioned and hereinafter set forth, the capacity of the canal of the plaintiffs for transportation exceeded the capacity of their aforesaid railroad to bring coal to the said canal for transportation, and the plaintiffs then contemplated enlarging the said canal, for the purpose of reducing the cost of transporting coal thereon, whereby the disparity between the relative capacities for transportation of the plaintiffs' canal and railroad would be greatly increased; and it accordingly became, and was for the interest of the public as well as of the plaintiffs that the surplus capacity of the said canal for transportation should not be unemployed, but should be used by other parties, which use by other parties would necessarily involve, in the construction of railroads connecting with said canal and otherwise, large investments of capital, and thus require that all arrangements for such use should be of a permanent character, of all which the defendants afterwards, to wit, on the day and year, and at the place aforesaid, had notice.

And whereas also the plaintiffs and the said Wyoming Coal Association had, on the 31st day of August, 1847, made a certain agreement, in writing, (and which is hereinafter set forth,) for the construction of a railroad from the coal lands of the said asssociation to the canal of the plaintiffs, and for the use by the said association of the surplus capacity for transportation of said canal, as above men-

tioned, of which the defendants afterwards, to wit, on the day and year, and at the place aforesaid, had notice.

And whereas also afterwards, to wit, on the 29th day of July, 1851, at the city of New York, in the southern district of
11 New York aforesaid, an agreement in writing was entered into by and between the plaintiffs and defendants, under their rsespective corporate seals, which said last-mentioned agreement, sealed with the seal of the defendants, the plaintiffs now bring here into court, the date whereof is the same day and year last aforesaid, and which is in the words and figures following, to wit:

Articles of agreement, made the twenty-ninth day of July, in the year of our Lord one thousand eight hundred and fifty-one, between the President, Managers, and Company of the Delaware and Hudson Canal Company, a corporation created by the legislature of the State of New York, parties of the first part, and the Pennsylvania Coal Company, a corporation created by the legislature of the State of Pennsylvania, party of the second part:

Whereas certain articles of agreement between the said Canal Company, of the one part, and the Wyoming Coal Association, of the other part, were made and entered into on the thirty-first day of August, in the year of our Lord one thousand eight hundred and forty-seven, which said articles of agreement are hereunto annexed;

And, whereas, the said Pennsylvania Coal Company has, at the instance and request of the said Wyoming Coal Association, made and constructed the railroad mentioned in said agreement, from the coal lands owned by the said association to the Delaware and Hudson canal;

And whereas all the business and interests of the said Wyoming Coal Association have been assigned and transferred to and are now vested in the said Pennsyivania Coal Company:

Now, therefore, in pursuance of the covenants and stipulations contained in the said annexed agreement, it is hereby mutually covenanted and agreed by and between the parties to these presents that the said annexed agreement shall henceforth stand and be deemed and taken to be in all respects the contract of the parties to these presents in the same manner, and each of the said parties shall have the same rights and remedies against the other as though the said Pennsylvania Coal Company had originally been the
12 party to the said agreement, instead of the said Wyoming Coal Association.

And the said Delaware and Hudson Canal Company does hereby covenant and agree to and with the said Pennsylvania Coal Company, its successors and assigns, that the said Canal Company will keep and perform unto the said Coal Company, its successors and assigns, all the covenants and stipulations in the said annexed agreement mentioned, to be kept or performed by the said Canal Company with the said Wyoming Coal Association.

And the said Pennsylvania Coal Company does hereby covenant and agree to and with the said Canal Company, that it will keep and

perform with the said Canal Company, its successors and assigns, all the covenants and stipulations in the said annexed agreement mentioned, to be kept or performed by the said Wyoming Coal Association, it being mutually understood and made part of this agreement that nothing contained therein is intended to, or shall in any manner or respect vary or alter the effect of, or give construction to the provisions of the said articles of agreement, bearing date August 31, 1847, except to substitute the said Pennsylvania Coal Company in place of said Wyoming Coal Association, as party thereto.

In witness whereof, the said parties to these presents have respectively affixed hereto their corporate seals, and subscribed the same by the proper officers of the said corporations respectively, the day and year first above written.

[CORPORATE SEAL.] WILLIAM MUSGRAVE,
Vice President of Delaware & Hudson Canal Co.

Attest: I. N. SEYMOUR,
Treasurer.

[CORPORATE SEAL.] JOHN EWEN,
President Pennsylvania Coal Co.

Attest: W. F. HAVEMEYER,
Treasurer.

As by the said agreement, reference being thereunto had, will more fully appear.

13 And the plaintiffs aver that the agreement between the plaintiffs and the said Wyoming Coal Association, hereinbefore mentioned, and in the last aforesaid agreement with the defendants referred to, and thereby made a part thereof, was and is in the words and figures following, to wit:

Articles of agreement, made this thirty-first day of August, in the year one thousand eight hundred and forty-seven, between the President, Managers, and Company of the Delaware and Hudson Canal Company, of the first part, and the Wyoming Coal Association, of the second part.

Whereas the railroad owned and used by the said The President, Managers, and Company of the Delaware and Hudson Canal Company, in connection with their canal, for the purpose of transporting coal to market, is not, in the judgment of the managers of the said company, even with the improvements made therein, sufficient to convey a quantity of coal at all equal to the quantity which the said canal is capable of transporting in its present condition;

And whereas it may be desirable to enlarge the said canal for the purpose of reducing the cost to the said company of transporting its coal thereon, even if the quantity so transported should not be extended, thus greatly increasing the present disparity between the relative capacities for transportation of the said canal and the said railroad;

And whereas the manifest interest of the said company is, that

in either event the surplus capacity for transportation of the said canal should not remain unemployed, and that the said surplus capacity should be allowed to be used at a reasonable rate of tolls by any other company which shall hold lands for the purpose of mining coal, and shall connect such lands by railroad, or otherwise, with the said canal, for the purpose of transporting coal thereon, which the said company could not so hold or connect;

And whereas influenced by these considerations, and aware that no company could prudently undertake to construct a railroad connecting with the said canal, without a certainty of being allowed to transport on the said canal at a permanent rate of tolls, the said Delaware and Hudson Canal Company, by resolution adopted
14 by its managers, April 28th, 1847, did, for the purpose of creating motive and inducement for capitalists to invest their funds in the construction of a railroad or railroads, to be connected with the canal of this company at or near the mouth of the Wallenpaupack river, offer to the acceptance of any who might avail themselves of the same, a permanent tariff of tolls on all coal entering the said canal by any such railroad;

And whereas an association, under the name and style of "The Wyoming Coal Association," was formed in the city of New York, by indenture and articles of agreement and association, dated June 24th, 1847, with a view to mining coal, and causing the same to be transported by railroad connecting with the said canal;

And whereas a negotiation has been had between the said association and the said Delaware and Hudson Canal Company, and a further proposition was made by a resolution adopted by the managers of the said company, July 15th, 1847, which said proposition, with more definite and complete provisions afterward agreed upon, has been accepted by the said The Wyoming Coal Association:

Now, therefore, in consideration of the premises, and of acts done and investments made, with a view to the transportation of coal on the canal of the said Delaware and Hudson Canal Company, as well as of the mutual undertakings herein contained, and of one dollar paid by the managers of the said Wyoming Coal Association to the said company, the receipt whereof is hereby acknowledged, the President, Managers, and Company of the Delaware and Hudson Canal Company do, for themselves and their successors and assigns, hereby covenant and agree to and with each and all of the persons who are original members of the said "The Wyoming coal association," by subscription to its original capital of three hundred thousand dollars, and their respective executors, administrators, and assigns, that the said The President, Managers, and Company of the Delaware and Hudson Canal Company, and their successors and assigns, will at all times hereafter furnish to any and all boats owned or used
15 by the said The Wyoming Coal Association, for the time being, or its assigns, for the purpose of transporting coal, entering the said canal by railroad, connecting with the said canal at or near the mouth of the Wallenpaupack river; or containing coal entering as aforesaid, belonging to or transported by or on account of the said

The Wyoming Coal Association, for the time being, or its assigns; or containing coal, entering as aforesaid, in which or the transportation of which the said The Wyoming Coal Association, for the time being, or its assigns, may be in any manner interested, or the transportation of which, under the provisions of this agreement, the said The Wyoming Coal Association, for the time being, or its assigns, may authorize or require all the facilities of navigation and transportation which the canal known as the Delaware and Hudson Canal shall afford, when in good and navigable condition and repair, to boats owned or used by any other company or persons, or belonging to or used by, or containing coal transported by, for, or on account of the said Delaware and Hudson Canal Company, or its successors or assigns, the said President, Managers, and Company, and their successors and assigns, charging and collecting a toll on the coal transported in pursuance of this agreement, at a rate per ton of two thousand two hundred and forty pounds, to be established in the manner following, viz:

On the first day of May, in each and every calendar year, the quantity of lump coal of the said Delaware and Hudson Canal Company which shall at that time have been sold to be delivered at Rondout, and to arrive by the said canal during the said calendar year, shall be ascertained, and the average price at which such sales shall have been contracted, shall also be ascertained, and from the average price thus ascertained, two dollars and fifty cents shall be substracted, and one half of the remainder shall be the toll per ton, during such calendar year, except that if any discount or deduction, contingent or otherwise, shall be agreed upon or comtemplated in the contracts for such sales, the said tolls shall be reduced correspondingly to such discount or deduction as shall be actually made. But provided, nevertheless, that if on the first day of May, in any calendar year, the quantity of lump coal of the said Delaware and Hudson Canal Company, which shall at that time have been sold as aforesaid, shall be less than one-half of the estimated sales for such year, the toll during such year shall be calculated in the manner hereinbefore provided, on the average price at which the sales of lump coal for such year shall be actually made; and if in any calendar year no sales of the coal of the Delaware and Hudson Canal Company shall be made, then, and in that case, the toll during such year shall be calculated on the sales for such year of the lump coal by the said The Wyoming Coal Association for the time being, or its assigns, in the manner hereinbefore provided for calculating the toll on the sales of the said Delaware and Hudson Canal Company.

16

And in case of an enlargement of the said canal the said President, Managers and Company, and their successors and assigns, may also charge and collect an additional toll on the coal transported in pursuance of this agreement, at a rate per ton of two thousand two hundred and forty pounds, to be established after the completion of the said enlargement in the manner following, viz.:

The cost of transportation per ton on the said canal, between the point at which such coal shall enter the said canal and the point on

the Rondout creek at which the said canal meets tide water, after the full effect of all the improvements previous to the said enlargement shall have been experienced, shall be fairly ascertained or estimated, the cost of transportation per ton on the said canal between those points, after the said enlargement shall have been completed, shall also be fairly ascertained or estimated, and one half of such portion of the reduction in the cost of transportation per ton on the said canal between those points as shall be estimated to have been produced by the said enlargement, and by no other cause, shall be the additional toll per ton to be thereafter permanently charged.

17 And if the managers of the said Delaware and Hudson Canal Company, and the managers of the said The Wyoming Coal Association, shall not be able to agree as to the just and proper amount of the reduction in the cost of transportation per ton on the said canal, between the aforesaid points, and as to the portion of such reduction which shall be produced by the said enlargement, the questions between them in respect thereto shall be submitted to two persons, one of whom shall be chosen by the managers of the said company, and the other of whom shall be chosen by the managers of the said association, and the persons so chosen shall, if themselves unable to agree, choose a third person, to whom also the [the] said questions shall be submitted, and the decision made in writing and signed by those assenting thereto of the two persons first chosen, if they shall agree, and if not, of a majority of the three persons chosen as aforesaid, shall be final and obligatory on the parties hereto as to the questions aforesaid.

Provided, nevertheless, and this covenant is upon the express condition, that until the said canal shall be enlarged so as to permit the transit of boats of larger tonnage than the present, the said President, Managers and Company, and their successors and assigns, shall not be bound to allow the quantity of coal transported in pursuance of this agreement to exceed, in any one season, four hundred thousand tons; and that after the said canal shall be so enlarged, the said President, Managers and Company, and their successors and assigns, shall not be bound to allow the quantity of coal transported in pursuance of this agreement to be increased so as to exceed in any one season one half of the whole capacity for transportation of the said canal, exclusive of the tonnage employed in the transportation of articles other than coal.

And for the considerations expressed in the preceding covenant the said The President, Managers and Company of the Delaware and Hudson Canal Company, for themselves, their successors and assigns, do hereby covenant and agree to and with each and all of the persons who are original members of the said The Wyoming Coal Association, and their respective executors, administrators and assigns,

18 that if at any time hereafter the business of the said The Wyoming Coal Association, for the time being, shall be vested in, or transferred to any corporation which shall be created by charter granted to the said association, for the time being, or any of its members, or which shall be formed under any general law, or

under any charter, or the corporate powers or privileges of which, acquired in any legal mode, shall be applied to the conduct of such business, then and in that case such corporation, and its successors and assigns, shall be allowed the use of the said Delaware and Hudson canal, for the purpose of transporting coal in the same manner and on the same conditions in and on which the said The Wyoming Coal Association shall have been or would have been entitled to such use by virtue of this agreement; and all the provisions of this agreement, in relation to the navigation and transportation on the said canal, shall apply in favor of the said corporation in as full and beneficial a manner as such provisions shall have or would have applied in favor of the said The Wyoming Coal Association. And the said President, Managers and Company, and their successors and assigns, will at all times thereafter faithfully keep and perform towards the said corporation, its successors and assigns, all and singular the covenants and agreements herein contained, in the same manner as if the said corporation had been originally the party to this agreement in place of the said The Wyoming Coal Association; and will at any time, when requested by the said corporation, or any of its officers, execute, seal and deliver to the said corporation, a contract to and with the said corporation, and its successors and assigns, containing all the covenants, agreements and provisions herein contained, adapting and making effectual the same to secure to the said corporation, and its successors and assigns, the enjoyment of all the rights, privileges, advantages and benefits herein granted or covenanted to the said The Wyoming Coal Association.

And for the considerations expressed in the preceding covenants, the said The President, Managers and Company of the Delaware and Hudson Canal Company, for themselves, their successors and
19 assigns, do hereby covenant and agree, to and with each and all of the persons who are original members of the said The Wyoming Coal Association, and their respective executors, administrators and assigns, that the said President, Managers and Company and their successors and assigns, will, from time to time, and at any and all times, and as often as may be requested by the managers of the said association, for the time being, execute, seal and deliver to the said managers any and all proper instruments which may be required by such managers, for the purpose of giving fuller effect and further assurance to this agreement and all of its provisions, according to the true intent and meaning thereof, and of extending the operation of the said agreement and all of its provisions, or the benefits thereof, to any persons who may hereafter become members of the said The Wyoming Coal Association, equally with the present members of the said association, and will make the said instruments to such persons or parties as the said managers shall designate for that purpose.

And for the considerations expressed in the preceding covenants, the said The President, Managers and Company of the Delaware and Hudson Canal Company, for themselves and their successors and assigns, do hereby covenant and agree to and with all the persons

who are original members of the said The Wyoming Coal Association, and their respective executors, administrators, and assigns, that if any suit or suits, proceeding or proceedings, in law or equity, in any court of this State, or of any other State, or of the United States, against the said President, Managers and Company, or their successors or assigns, instituted for the purpose of enforcing this agreement, or any of its provisions, or arising out of this agreement, or of any of its provisions, or of the subject matter thereof, shall be commenced by the authority or with the assent of a majority of the persons who may, at such time, be the managers of the said association, for the time being, or under the authority or with the assent of a majority in interest of the persons who may at such time be the shareholders of the said association, for the time being; and if any non-joinder or mis-joinder of any person or persons as party
20 plaintiff or parties plaintiffs to any such suit or proceeding shall happen, the said President, Managers and Company, their successors and assigns, will not, at any stage of such suit or proceeding, plead or in any manner whatsoever object to, or take advantage of, any such non-joinder or mis-joinder, but will waive, and do hereby waive, any and every such non-joinder and mis-joinder in any and every such suit and proceeding; and if, while any such suit or proceeding shall be pending, any event in respect to any party plaintiff thereto shall happen, by which such suit or proceeding might abate, or by which any act therein on the part of the plaintiffs shall be required, and such act shall be omitted, the said President, Managers and Company, their successors and assigns, will not, at any stage of such suit or proceeding, plead or in any manner whatsoever object to, or take advantage of, any such event or omission, but will waive, and do hereby waive, any and every such event and omission and the legal benefit and effect therefrom accruing to the said President, Managers and Company and their successors and assigns, in any and every such suit and proceeding; and if, at at any time hereafter, any person who is, or shall be at such time, a member of the said association, other than the managers, at such time of the said association for the time being, acting by a majority in the manner prescribed, and under authority granted by the articles of the said association, shall release any right, interest, benefit or cause of action to which the said association shall be entitled by virtue of this agreement, or any of its provisons, or shall make any admission, or do any act as a party plaintiff to any such suit or proceeding as aforesaid, the said President, Managers and Company, and their successors and assigns, will not, in any stage of any such suit or proceeding, plead or in any manner whatever take advantage of any such release, admission or act, but will waive, and do hereby waive, any and every such release, admission, and act, and the legal benefit and effect accruing therefrom to the said President, Managers and Company, or their successors and assigns, in any and every such suit and proceeding. And the said President, Managers and Company, and their successors and assigns, will suffer any and every such suit and
21 proceeding, as aforesaid, to go on to final determination, judgment, decree and execution, notwithstanding any and

every non-joinder and mis-joinder, as aforesaid, any and every event and omission, as aforesaid, any and every release, admission and act, as aforesaid, in the same manner and with the same legal effect and obligation as if no such non-joinder, mis-joinder, event, omission, release, admission or act had ever happened.

And in consideration of the mutual undertakings herein contained, the said the Wyoming Coal Association, for the persons who are the the original members of the said association, and their respective executors, administrators and assigns, does hereby promise and agree to and with the said President, Managers and Company, and their successors and assigns, that if any suit or suits, proceeding or proceedings, in law or eqnity, against the said persons or the survivors of them in any court of this State, or of any other State, or of the United States, instituted for the purpose of enforcing this agreement, or any of its provisions, or arising out of this agreement or any of its provisions, or of the subject-matter thereof, shall be commenced by the said President, Managers and Company, or their successors or assigns, the said persons who are original members of the said The Wyoming Coal Association, and each and every of them who shall be parties defendants to any such suit or proceeding, will not, at any stage of such suit or proceeding, plead or in any manner whatever object to, or take advantage of, but will waive, and do hereby waive, any and every non-joinder, mis-joinder, event or omission in respect to the parties, defendants to such suit or proceeding, which non-joinder, mis-joinder, event, omission, if happening in respects to the parties plaintiffs, in a similar suit or proceeding, the said President, Managers and Company would be bound by their next proceeding covenant to waive, but will suffer any and every such suit or proceeding, notwithstanding any and every such non-joinder, mis-joinder, event and omission, to go on to final determination, judgment, decree and execution, in the same manner and with the same legal effect and obligation as if no such non-joinder, mis-joinder, event or omission had ever happened.

22

And in consideration of the mutual undertakings herein contained, the said the Wyoming Coal Association does, for the persons who are original members of the said association, and their respective executors, administrators and assigns, hereby promise and agree to and with the said The President, Managers and Company of the Delaware and Hudson Canal Company, and their successors and assigns, that the said association, for the time being, will use all its influence to cause the speedy construction of a railroad from the coal lands owned by the said association to the Delaware and Hudson Canal at or near the mouth of the Wallenpaupack river; and that if the construction of such a railroad shall not be commenced within one year from the date hereof, and completed within three years from the date hereof, then, and in that case, the said President, Managers and Company, and their successors, may declare this agreement null and void.

In testimony whereof, the said The President, Managers and Com-

pany of the Delaware and Hudson Canal Company have caused their corporate seal to be hereunto affixed and attested by the signatures of their vice president and treasurer.

And the said The Wyoming Coal Association have subscribed these presents by the managers duly authorized for that purpose by the articles of the said association, in duplicate, the day and year first above written.

ISAAC L. PLATT, *Vice President.*

[SEAL.] (Attest) I. N. SEYMOUR, *Treasurer.*

The Wymoning Coal Association by—

IRAD HAWLEY,
A. G. STOUT,
W. F. HAVEMEYER,
WM. H. FALLS,
WM. S. HERRIMAN,
JOHN WURTZ,
ISAAC L. PLATT,
Managers of the said Association.

Signed inthe presence of—
RICHARD A. NODYNE.

As by the said agreements will, on reference thereto, more fully and at large appear.

23 And the plaintiffs, in fact, say that under and in pursuance of the said agreement of August 31st, 1847, the defendants afterwards, to wit, on the 1st day of June, 1850, at Hawley, in the State of Pennsylvania, to wit, in the southern district of New York aforesaid, constructed and put in operation a railroad leading from the coal mines of said defendants, to which the said contracts related, and in reference to which the same were made to the said canal, and connecting therewith, at or near the mouth of the Wallenpaupack river, to wit, at Hawley aforesaid, a distance of about 100 miles by the said canal to its eastern terminus, at tide-water, near Rondout, on the Hudson river.

And the said plaintiffs further say, that relying upon the covenants and undertakings of the defendants in their aforesaid agreement contained, they did also, immediately thereafter, to wit, on the day and year last aforesaid, enter upon the work of enlarging their canal, and did thereafter prosecute the same diligently, and at great expense, until the completion thereof, to wit, on the 28th day of July, 1853, of which due notice was given to the defendants on that day, at Hawley aforesaid, in the southern district of New York.

And the plaintiffs further say, that at the time of the execution of the said contract with the said Wyoming Coal Association, the said canal did not permit the transit of boats of a tonnage of more than 50 tons, and that after the said enlargement it permitted the transit of boats of a much greater tonnage, to wit, of the tonnage of 125 tons; and the whole capacity of the said canal for transportation in each and every season of navigation, after the said enlargement, exclusive of the tonnage employed in the transportation of articles other than

coal, was largely increased, to wit, to the extent of eighteen hundred thousand tons, one-half whereof, to wit, nine hundred thousand tons, was, by the terms of the said contract, subject to be used by the defendants, of all which the defendants had notice, at Hawley aforesaid, to wit, in the southern district of New York.

And the plaintiffs further, in fact, say, that the defendants,
24 claiming the benefit and privileges of the said contracts above set forth, did, after the completion of their said railroad, to wit, on the 1st day of June, 1850, at Hawley aforesaid, to wit, in the southern district of New York, construct and procure a large number of boats, to be used upon the said canal in the transportation of coal of the defendants, brought thereto over their said railroad, and, until the grievances hereinafter complained of, did thereafter, during every season of navigation, transport, under the provisions of the aforesaid contracts, all the coal brought over their railroad, which they sent forward to the markets contemplated in and by the aforesaid agreements.

And the plaintiffs further aver, that since the said enlargement of their said canal, they have at all times been ready and willing to furnish to any and all boats owned or used by the defendants, for the purpose of transporting coal entering the said canal by railroad, connecting with the said canal at or near the mouth of the Wallenpaupack river, to wit, by the railroad of the said defendants hereinbefore mentioned, or containing coal entering as aforesaid, belonging to or transported by or on account of the defendants, or containing coal entering as aforesaid, in which, or the transportation of which, the said defendants were or might be in any manner interested, or the transportation of which, under the provisions of the said agreements, the defendants might authorize or require, all the facilities of navigation and transportation which the said canal ever afforded when in good navigable condition and repair, to boats owned or used by any other company or person, or belonging to, or used by, or containing coal transported by, for, or on account of the plaintiffs, to the extent of one-half of the whole capacity of transportation of the said enlarged canal, exclusive of the tonnage employed for the transportation of articles other than coal, of all which the defendants had notice, to wit, on the day and year and at the place aforesaid.

And the plaintiffs further say, that although all the coal brought over the said railroad of the defendants, connecting as aforesaid, (until the committing of the grievances hereinafter mentioned) had been, in fact, transported upon the canal of the plaintiffs,
25 under the aforesaid agreements; and although, since the said enlargment, an amount exceeding the one-half of the whole capacity of the said canal for transportation, exclusive of the tonnage employed for the transportation of articles other than coal, had never in any one season been brought over the railroad of the defendants above mentioned, or been ready to enter the said canal by the said railroad.

And although the said plaintiffs have in all things conformed themselves to and observed and performed all and singular the stipulations,

conditions, matters, and things which, on their part, were to be observed and performed, according to the terms of the said agreements, and have at all times reserved for the transportation of the coal of the defendants, to be brought to the said canal over the said railroad of the defendants, one-half of the whole capacity of the said enlarged canal for transportation, in each and every season, exclusive of the tonnage employed in the transportation of articles other than coal; and although the said capacity, so reserved as aforesaid, was sufficient for the transportation of all the coal in each and every season transported over the said railroad of the defendants, connecting with the said canal as aforesaid, nevertheless, the said defendants, not regarding their said covenant and undertaking to transport over the said canal, paying to the plaintiffs the rate of toll in the said agreements prescribed for such transportation, all their coal, to the extent of one-half of the whole capacity for transportation of the said canal, (exclusive of the tonnage employed in the transportation of articles other than coal,) which the said defendants might transport in each and every season over their said railroad, connecting with the said canal as aforesaid, did not nor would so transport their said coal over the said canal of the plaintiffs, but contriving and intending to evade their aforesaid covenant and undertaking in that behalf, and to injure the plaintiffs in the premises, afterwards, to wit, on the 1st day of January, 1862, at Hawley aforesaid, in the southern district of New York, without the knowledge or consent of the plaintiffs, did induce the New York & Erie Railroad Company
26 to build a branch leading from its main railroad, so as to connect with the railroad of the defendants at the point where it connects with the said canal, and to run therefrom to the Hudson river, in the State of New York; and the defendants did thereupon, afterwards, and during the respective seasons of navigation in the years 1862 and 1864, divert from entering the said canal, to be transported thereupon, under the terms and provisions of the said contract, and did deliver to and cause to be transported by the said branch railroad of the New York & Erie Railroad Company, a large quantity of their coal, to wit, during the period of canal navigation in the year 1863, 100,000 tons, and during the period of canal navigation in the year 1864, 300,000 tons, which coal the defendants had brought over their said railroad to the said place of its connection with the said canal at Hawley aforesaid.

And the plaintiffs further say, that the coal herein lastly above mentioned, and so diverted as aforesaid, was in a condition to be, and should and might have been, sent forward by, and transported upon, the said canal, and was coal which, by the terms and provisions of the aforesaid agreement, the defendants had undertaken to send forward by, and transport upon, the said canal; and that if the said coal, so diverted as aforesaid, had been so sent forward and transported upon the said canal, the plaintiffs, by the terms of the said agreement, would have been entitled to charge and collect as the toll thereon, and the defendants would have been bound to pay therefor a large sum of money, to wit, the sum of $900,000, whereby the plaintiffs have been greatly damaged.

And so the plaintiffs, in fact, say that the defendants (although often requested to do so) have not kept the said covenant so by them made as aforesaid, but have broken the same; and to keep the same with the said plaintiffs have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of the said plaintiffs of one million of dollars, and, therefore, they bring their suit, &c.

Pleas.

27 First plea. And the said, The Pennsylvania Coal Company, defendants, by Evarts, Southmayd & Choate, their attorneys, come and defend the wrong and injury, when, &c., and say that the said supposed agreement in writing, bearing date July twenty-ninth, eighteen hundred and fifty-one, in the said declaration mentioned, is not their deed, and of this they put themselves upon the country; and the said plaintiffs do the like, &c.

Second plea. And by leave of the court, first had and obtained, the said defendants, protesting that the said declaration, and the matters therein contained, are not sufficient in law for the said plaintiffs to have or maintain their aforesaid action against the said defendants, yet, nevertheless, for further plea in this behalf, the said defendants say, that the said plaintiffs ought not to have or maintain their aforesaid action thereof against the said defendants, because they say that the resolutions adopted by the plaintiffs, through their board of mangers, on the twenty-eighth day of April, eighteen hundred forty-seven, which are recited and referred to in the agreement, in writing, bearing date August 31, 1847, in the said declaration set forth, were in the words and figures following, to wit:

"At a meeting of the board of managers of the Delaware and Hudson Coal Company, held on the 28th day of April, 1847; present, the President and Messrs. Stout, Herriman, Hitchcock, Holmes, Le Roy, Hawley, Young, Platt, Vice President.

"The minutes of the last meeting were read and approved.

"The committee appointed at the last meeting to prepare a tariff of tolls, presented a report, of which the following is a copy:

"The committee to whom was referred, on the 24th of April, inst., the duty of preparing a tariff of tolls on coal and other articles that may hereafter be transported on the company's canal, entering it from a railroad or railroads that may be connected with it, at or near the mouth of the Wallenpaupack river, respectfully report:

"That they recommend, in reference to the article of coal,
28 the adoption, with some modification, of a tariff prescribed in the proceedings of this board, on the 27th of January, 1846, in which it is provided that, on the first day of May, in each and every year, the quantity of lump coal sold by the Delaware and Hudson Canal Company, to arrive that year by canal, shall be ascertained, and also the average price per ton of such sales; and that price shall be taken as the value of coal for that year by which the canal toll on it is to be regulated

during the year, on all coal coming to the canal by the proposed road or roads. If such sales shall not average above three dollars and fifty cents per ton, delivered at Rondout, then the toll for that year shall not exceed one-sixth of such average price, whatever it may be; and if the sale shall average above three dollars and fifty cents per ton, delivered at Rondout, then the toll for that year shall not exceed one-fifth of such average price, whatever it may be. For example, if the sales shall average, say three dollars per ton, the toll for the year would be fifty cents per ton.

"If	$3 15,	the toll for the year would be		$52\frac{1}{2}$	cents per ton.
"	3 25,	"	"	54 1-6	"
"	3 30,	"	"	55	"
"	3 36,	"	"	56	"
"	3 40,	"	"	$56\frac{2}{3}$	"
"	3 50,	"	"	$58\frac{1}{3}$	"
"	3 51,	"	"	70 1-5	"
"	3 60,	"	"	72	"
"	3 70,	"	"	74	"
"	3 75,	"	"	75	"

"And so of any intermediate or other average price; but in no event shall the tolls be less than fifty cents per ton. Should the company hereafter increase the capacity of boats navigating the canal, by an enlargement of the locks or otherwise, so as to reduce the rate of freight previously paid on coal, the company reserves to itself the right to add to the amount of such reduction per ton on freight to the above rate of toll.

"The committee deem it inexpedient to fix any definite period for the continuance of the above rate of toll; such a limitation would operate as a discouragement and hindrance to those who may 29 be disposed to make a railroad communication with the canal, and perhaps prevent it entirely. Nor do the committee deem it expedient to comprehend in the proposed tariff any article except coal. The company itself deals in no other, and hence there cannot be any just grounds of apprehension that an unreasonable toll will be exacted. There has never been any dissatisfaction expressed in regard to the canal tariff generally; and as articles coming to the canal by the proposed new road or roads would be subject to to the same tariff as articles passing back and forth between Honesdale and tide-water, it is thought by the committee that this branch of the subject requires no special action by the board, at present, at any rate. There are but two articles, (iron and limestone,) in relation to which any modification of the general canal tariff would, in the opinion of the committee, be admissible, and it will be time enough to make such a modification, if at all, when there shall be further evidence of its propriety. The committee submit for the consideration of the board the following resolutions, as a part of this report, to wit:

"Resolved, That the foregoing tariff on coal entering this company's canal by any railroad or railroads that may be connected with it, at or near the mouth of the Wallenpaupack river, be, and the same

is hereby, approved and adopted, and the faith of the company is hereby pledged for the observance of the same, subject to the right of advance reserved in the body of this report in case of a reduction in freight, in the manner therein contemplated.

"Resolved, That the foregoing tariff on coal is offered to create motive and inducement for capitalists to invest their funds in the construction of a railroad or railroads to be connected with the canal of this company, at or near the mouth of the Wallenpaupack river, and is, therefore, to have no relation to, or bearing on, the toll to which coal will be subject that may come to the canal by the company's own railroad.

(Signed) "JOHN WIRTS
"SILAS HOLMES,
"IRAD HAWLEY,
"*Committee.*

30 "It was moved and seconded 'That the report be received and adopted; and, after discussion and consideration of the same, it was unanimously agreed to.'"

And the negotiation which was had between the said Wyoming association and the plaintiffs, as mentioned in the said agreement, in writing, bearing date August 31, 1847, in the declaration mentioned, was so had by and through committees of conference, appointed by the said parties respectively, under and in pursuance of certain resolutions passed by the board of managers of the said the Wyoming association, on the 13th day of July, 1847, and by them communicated to the plaintiffs, which were in the words and figures following, that is to say:

"Whereas the tariff of tolls, proposed by the Delaware and Hudson Coal Company for transportation on its canal, is not such as, without modfication and more definite settlement, would warrant this association in constructing a railroad to connect with said canal; and

"Whereas this association believes that it is practicable to arrange this tariff in such manner as to make it mutually advantageous:

"Resolved, That the board of directors of the Delaware and Hudson Canal Company be requested to appoint a committee to confer with a committee of this association on the [the] subject.

"Resolved, That Mr. Havemeyer, Mr. A. G. Stout, and Mr. William H. Falls be a committee, on the part of this association, to meet the committee of the Delaware and Hudson Canal Company, if one be appointed."

And that the resolution adopted by the managers of the said plaintiffs, on the fifteenth day of July, eighteen hundred and forty-seven, which is recited and referred to in the said agreement, in writing, bearing date August 31, 1847, in the declaration mentioned, was in the words and figures following, to wit:

"NEW YORK, *July* 15, 1847.

"The board met, pursuant to adjournment. The minutes of the last meeting were read and approved."

31 The committee appointed to meet the committee of the Wyoming Coal Association reported "They had a conference with that committee during the interval of adjournment, and the subject of a canal tariff on coal was discussed. The committee of the association did not submit any deffinite propositions on the subject; but, from views presented by them, your committee were induced to present to the committee of the association the following proposition, to wit:

"As the basis of an arrangement between the Delaware and Hudson Canal Company and the Wyoming Coal Association, it is proposed that the probable prospective cost of coal delivered at Rondout, from the Lackawanna or Wyoming Valley, shall be assumed at $2 50 per ton; then, to ascertain the toll to be paid by the association to the Delaware and Hudson Canal Company, the sales of lump coal in each and every year, up to the 1st of May, to be delivered at Rondout, shall be ascertained, and the average price per ton of such sales shall be also ascertained, and half the difference between that and the cost of the coal—say $2.50 per ton— to be paid by the association during that year; provided, however, that this stipulated toll shall not be extended beyond 400,000 tons in any one year"

"This proposition, however, was not satisfactory to the committee of the association, and, on their part, they were not prepared to submit one. but said they were 'unanimous in naming $2.60 as the proper sum to be assumed as the cost of coal at Rondout, for the purpose of an agreement in regard to tolls.' No agreement, however, was come to between the two committees as a basis of a report to their constituents; but the committee of the association withdrew from the conference with the proposition of this committee, to be further considered by the committee of the association on their principals."

The report of the committee was accepted, and it was then—

Resolved, That the officers of this company be, and they hereby are, authorized to contract with the Wyoming Coal Association in relation to toll on coal passing down the company's canal
32 from any railroad that such association may cause to be connected with the canal, at or near the mouth of the Wallenpaupack river, according to the provisions of the propositions contained in the foregoing report."

And the said defendants further say, that the rights, privileges, and franchises which had been granted to them by the State of Pennsylvania, had not been so granted with the design that the City of New York, and other parts of the State of New York, might receive a supply of coal through the said canal of the said plaintiffs, as in the said declaration is alleged; and that it is not true that the said time, when, &c., in the declaration mentioned, there was no other avenue than the said canal of the plaintiffs contemplated, by which the said The Wyoming association or the defendants could transport their coal to market. And the said defendants further say, that at the respective times of the making of the agreements in writing in the declaration mentioned, it was not for the interest of the public as well as of

the plaintiffs that the surplus capacity of the said canal for transportation should not remain unemployed, but should be used by other parties, and at the said respective times the circumstances and considerations in said declaration in that behalf mentioned did not require that all arrangements for the use of the said canal by other parties should be of a permanent character, as in the said declaration is in that behalf alleged.

And the said defendants further say, that they did not, under and in pursuance of the said agreement of August 31, 1847, construct or put in operation a railroad leading from the coal mines of the said defendants, to which the said contract related, and in reference to which the same were made, to the said canal, or connecting therewith, and that the plaintiffs did not, in reliance upon the covenants or undertakings of the defendants in their said agreements contained, enter upon the work of enlarging their said canal, or prosecute or complete the same; and that by or after such enlargement the whole capacity of the said canal for transportation, in each and every season of navigation, after the said enlargement, exclusive of
33 the tonnage employed in the transportation of articles other than coal, was not increased, to wit, to the extent of eighteen hundred thousand tons of coal; and that the one half of such alleged increased capacity, to wit, nine hundred thousand tons, was not by the terms of the said contracts subject to be used by the defendants, and that the plaintiffs have not at all, or at any of the times in the declaration mentioned or referred to, reserved for transportation of coal of the defendants, to be brought to the said canal over the said railroad of the defendants, one half of the whole capacity of the said canal for transportation, in each and every season, exclusive of the tonnage employed in the transportation of articles other than coal, or any part of the capacity of such enlarged canal, save what was actually used and employed in the transportation of coal on said canal for the said defendants.

And that the said defendants did not induce the New York and Erie Railroad Company to build a branch leading from its main railroad, so as to connect with the railroad of the defendants at the point where it connects with the said canal, and that such supposed branch railroad of the New York and Erie Railroad Company, in the declaration mentioned, did not connect with the said railroad of the defendants at the point where said railroad of the defendants connects with said canal.

And this the said defendants are ready to verify; wherefore they pray judgment, if the said plaintiffs ought to have or maintain their aforesaid action thereof against them, &c.

Third Plea. And for a further plea in this behalf, by leave of the court first had and obtained, the said defendants say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because, protesting that the said declaration and the matters therein contained are not sufficient in law for the said plaintiffs to have or maintain their aforesaid action against the said defendants, and that in and by agreement, in writing, in the said

during the year, on all coal coming to the canal by the proposed road or roads. If such sales shall not average above three dollars and fifty cents per ton, delivered at Rondout, then the toll for that year shall not exceed one-sixth of such average price, whatever it may be; and if the sale shall average above three dollars and fifty cents per ton, delivered at Rondout, then the toll for that year shall not exceed one-fifth of such average price, whatever it may be. For example, if the sales shall average, say three dollars per ton, the toll for the year would be fifty cents per ton.

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"And so of any intermediate or other average price; but in no event shall the tolls be less than fifty cents per ton. Should the company hereafter increase the capacity of boats navigating the canal, by an enlargement of the locks or otherwise, so as to reduce the rate of freight previously paid on coal, the company reserves to itself the right to add to the amount of such reduction per ton on freight to the above rate of toll.

"The committee deem it inexpedient to fix any definite period for the continuance of the above rate of toll; such a limitation would operate as a discouragement and hindrance to those who may
29 be disposed to make a railroad communication with the canal, and perhaps prevent it entirely. Nor do the committee deem it expedient to comprehend in the proposed tariff any article except coal. The company itself deals in no other, and hence there cannot be any just grounds of apprehension that an unreasonable toll will be exacted. There has never been any dissatisfaction expressed in regard to the canal tariff generally; and as articles coming to the canal by the proposed new road or roads would be subject to to the same tariff as articles passing back and forth between Honesdale and tide-water, it is thought by the committee that this branch of the subject requires no special action by the board, at present, at any rate. There are but two articles, (iron and limestone,) in relation to which any modification of the general canal tariff would, in the opinion of the committee, be admissible, and it will be time enough to make such a modification, if at all, when there shall be further evidence of its propriety. The committee submit for the consideration of the board the following resolutions, as a part of this report, to wit:

"Resolved, That the foregoing tariff on coal entering this company's canal by any railroad or railroads that may be connected with it, at or near the mouth of the Wallenpaupack river, be, and the same

is hereby, approved and adopted, and the faith of the company is hereby pledged for the observance of the same, subject to the right of advance reserved in the body of this report in case of a reduction in freight, in the manner therein contemplated.

"Resolved, That the foregoing tariff on coal is offered to create motive and inducement for capitalists to invest their funds in the construction of a railroad or railroads to be connected with the canal of this company, at or near the mouth of the Wallenpaupack river, and is, therefore, to have no relation to, or bearing on, the toll to which coal will be subject that may come to the canal by the company's own railroad.

(Signed) "JOHN WIRTS
"SILAS HOLMES,
"IRAD HAWLEY,
"*Committee.*

30 "It was moved and seconded 'That the report be received and adopted; and, after discussion and consideration of the same, it was unanimously agreed to.'",

And the negotiation which was had between the said Wyoming association and the plaintiffs, as mentioned in the said agreement, in writing, bearing date August 31, 1847, in the declaration mentioned, was so had by and through committees of conference, appointed by the said parties respectively, under and in pursuance of certain resolutions passed by the board of managers of the said the Wyoming association, on the 13th day of July, 1847, and by them communicated to the plaintiffs, which were in the words and figures following, that is to say:

"Whereas the tariff of tolls, proposed by the Delaware and Hudson Coal Company for transportation on its canal, is not such as, without modfication and more definite settlement, would warrant this association in constructing a railroad to connect with said canal; and

"Whereas this association believes that it is practicable to arrange this tariff in such manner as to make it mutually advantageous:

"Resolved, That the board of directors of the Delaware and Hudson Canal Company be requested to appoint a committee to confer with a committee of this association on the [the] subject.

"Resolved, That Mr. Havemeyer, Mr. A. G. Stout, and Mr. William H. Falls be a committee, on the part of this association, to meet the committee of the Delaware and Hudson Canal Company, if one be appointed."

And that the resolution adopted by the managers of the said plaintiffs, on the fifteenth day of July, eighteen hundred and forty-seven, which is recited and referred to in the said agreement, in writing, bearing date August 31, 1847, in the declaration mentioned, was in the words and figures following, to wit:

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"The board met, pursuant to adjournment. The minutes of the last meeting were read and approved."

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"As the basis of an arrangement between the Delaware and Hudson Canal Company and the Wyoming Coal Association, it is proposed that the probable prospective cost of coal delivered at Rondout, from the Lackawanna or Wyoming Valley, shall be assumed at $2 50 per ton; then, to ascertain the toll to be paid by the association to the Delaware and Hudson Canal Company, the sales of lump coal in each and every year, up to the 1st of May, to be delivered at Rondout, shall be ascertained, and the average price per ton of such sales shall be also ascertained, and half the difference between that and the cost of the coal—say $2.50 per ton— to be paid by the association during that year; provided, however, that this stipulated toll shall not be extended beyond 400,000 tons in any one year."

"This proposition, however, was not satisfactory to the committee of the association, and, on their part, they were not prepared to submit one, but said they were 'unanimous in naming $2.60 as the proper sum to be assumed as the cost of coal at Rondout, for the purpose of an agreement in regard to tolls.' No agreement, however, was come to between the two committees as a basis of a report to their constituents; but the committee of the association withdrew from the conference with the proposition of this committee, to be further considered by the committee of the association on their principals."

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Resolved, That the officers of this company be, and they hereby are, authorized to contract with the Wyoming Coal Association in relation to toll on coal passing down the company's canal
32 from any railroad that such association may cause to be connected with the canal, at or near the mouth of the Wallenpaupack river, according to the provisions of the propositions contained in the foregoing report."

And the said defendants further say, that the rights, privileges, and franchises which had been granted to them by the State of Pennsylvania, had not been so granted with the design that the City of New York, and other parts of the State of New York, might receive a supply of coal through the said canal of the said plaintiffs, as in the said declaration is alleged; and that it is not true that the said time, when, &c., in the declaration mentioned, there was no other avenue than the said canal of the plaintiffs contemplated, by which the said The Wyoming association or the defendants could transport their coal to market. And the said defendants further say, that at the respective times of the making of the agreements in writing in the declaration mentioned, it was not for the interest of the public as well as of

the plaintiffs that the surplus capacity of the said canal for transportation should not remain unemployed, but should be used by other parties, and at the said respective times the circumstances and considerations in said declaration in that behalf mentioned did not require that all arrangements for the use of the said canal by other parties should be of a permanent character, as in the said declaration is in that behalf alleged.

And the said defendants further say, that they did not, under and in pursuance of the said agreement of August 31, 1847, construct or put in operation a railroad leading from the coal mines of the said defendants, to which the said contract related, and in reference to which the same were made, to the said canal, or connecting therewith, and that the plaintiffs did not, in reliance upon the covenants or undertakings of the defendants in their said agreements contained, enter upon the work of enlarging their said canal, or prosecute or complete the same; and that by or after such enlargement the whole capacity of the said canal for transportation, in each and every season of navigation, after the said enlargement, exclusive of
33 the tonnage employed in the transportation of articles other than coal, was not increased, to wit, to the extent of eighteen hundred thousand tons of coal; and that the one half of such alleged increased capacity, to wit, nine hundred thousand tons, was not by the terms of the said contracts subject to be used by the defendants, and that the plaintiffs have not at all, or at any of the times in the declaration mentioned or referred to, reserved for transportation of coal of the defendants, to be brought to the said canal over the said railroad of the defendants, one half of the whole capacity of the said canal for transportation, in each and every season, exclusive of the tonnage employed in the transportation of articles other than coal, or any part of the capacity of such enlarged canal, save what was actually used and employed in the transportation of coal on said canal for the said defendants.

And that the said defendants did not induce the New York and Erie Railroad Company to build a branch leading from its main railroad, so as to connect with the railroad of the defendants at the point where it connects with the said canal, and that such supposed branch railroad of the New York and Erie Railroad Company, in the declaration mentioned, did not connect with the said railroad of the defendants at the point where said railroad of the defendants connects with said canal.

And this the said defendants are ready to verify; wherefore they pray judgment, if the said plaintiffs ought to have or maintain their aforesaid action thereof against them, &c.

Third Plea. And for a further plea in this behalf, by leave of the court first had and obtained, the said defendants say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because, protesting that the said declaration and the matters therein contained are not sufficient in law for the said plaintiffs to have or maintain their aforesaid action against the said defendants, and that in and by agreement, in writing, in the said

declaration mentioned, the said defendants did in no wise covenan not to divert from their railroad in the declaration mentioned, connecting their coal lands with the plaintiff's canal, any coal which they should choose so to divert therefrom, nor to transport over
34 said canal any other coal than they should choose so to transport ; yet, nevertheless, for further plea in this behalf, the said defendants say that they did not, during the respective seasons of navigation upon the said canal, for the years eighteen hundred and sixty-three and eighteen hundred and sixty-four, divert from entering the said canal, to be transported thereupon, under the terms and provisions of the said contract, nor deliver to, or cause to be transported by, the said branch railroad of New York and Erie Railroad Company the coal in that behalf in the declaration mentioned, to wit, during the period of canal navigation in the year 1863, one hundred thousand tons, and during the period of canal navigation in the year 1864, three hundred thousand tons, nor any part thereof; and of this the said defendants put themselves upon the country, &c.

Fourth Plea. And for a futher plea in this behalf, by leave of the court first had and obtained, the said defendants say that the said plaintiffs their aforesaid action thereof against them ought not to have or maintain, because protesting, as in the plea by them last above pleaded ; nevertheless, for further plea, they say that they did not, during the respective seasons of navigation upon said canal of the years eighteen hundred and sixty-three and eighteen hundred and sixty-four, divert from entering the said canal, to be transported thereupon, under the terms and provisions of the said contract, nor deliver to, or cause to be transported by, the said branch railroad of the New York and Erie Railroad Company any of the coal which the defendants had brought over their said railroad to the said place of its connection with the said canal at Hawley aforesaid, as the plaintiffs in their said declaration have alleged ; and of this they put themselves upon the country, &c.

Fifth Plea. And for a further plea in this behalf, by leave of the court first had and obtained, the said defendants say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because protesting as last aforesaid ; nevertheless, for plea, they say that they did not, during the respective seasons of navigation upon said canal, of the years eighteen hundred and sixty-three and eighteen hundred and sixty-four, divert from enter-
35 ing the said canal, to be transported thereupon, under the terms and provisions of the said contrac., nor deliver to nor cause to be transported by the said branch railroad of New York and Erie Railroad Company, any coal which was in a condition to be, or which should have been, sent forward by and transported upon the the said canal, nor any coal which by the terms and provisions of the aforesaid agrement in that behalf in the declaration mentioned, the defendants had undertaken to send forward by or transport upon the said canal, as the plaintiffs, in their said declaration, have alleged, and of this the said defendants put themselves upon the conntry, &c.

Sixth plea. And for a further plea in this behalf, by leave of the

court first had and obtained, the said defendants say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because protesting, as last aforesaid; nevertheless, for further plea, they say that if the said supposed coal, in the said declaration alleged to have been by them diverted from transportation upon the said canal, had been by the said defendants sent forward to and transported upon the said canal, the plaintiffs, by and according to the terms of the said agreement, would not have been entitled to charge or collect as the toll thereon calculated, as by the said agreement prescribed, and the defendants would not have been bound to pay therefor the sum of nine hundred thousand dollars, in the said declaration mentioned, nor any part thereof, and of this they put themselves upon the country, &c.

Amended seventh plea. And for a further plea in this behalf, by leave of the court first had and obtained, the said defendants say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because protesting, as last aforesaid; nevertheless, for further plea, they say that they did, to wit, at Hawley aforesaid, to wit, during the respective seasons of navigation upon the said canal, in the years 1863 and 1864, transport and cause to be transported upon the said canal all coal contained in boats owned or used by them, for the purpose of transporting coal
36 entering the said canal by railroad connecting with the said canal at or near the mouth of the Wallenpaupack river, and all coal belonging to them or transported by them, or on their account, or in which or the transportation of which they were in anywise interested, which entered the said canal by railroad connecting with the said canal at or near the mouth of the Wallenpaupack river, and paid to the plaintiffs all the toll chargeable thereon under and in pursuance of and according to the said agreement in the declaration mentioned, and of this they put themselves upon the country, &c.

Amended eighth plea. And for a further plea in this behalf, by leave of the court first had and obtained, the said defendants say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because protesting, as last aforesaid; nevertheless, for further plea, they say that they did, to wit, at Hawley aforesaid, to wit, during the respective seasons of navigation upon the said canal, in the years 1863 and 1864, navigate upon and through the said canal of the plaintiffs, all boats owned and used by the said defendants for the purpose of transporting coal entering the said canal by railroad connecting with the said canal at or near the mouth of the Wallenpaupack river, and all boats containing coal entering as aforesaid, belonging to or transported by or on account of the said defendants, and all boats containing coal entering as aforesaid, in which or the transportation of which the said defendants were in any manner interested, or the transportation of which, under the provisions of the said agreement, the said defendants authorized or required; and that the said defendants duly paid to the plaintiffs all the tolls chargeable upon or for the transportation of all the coal

contained in such boats, under and in pursuance of and according to the said agreement in the declaration mentioned, and of this they put themselves upon the country, &c.

Amended ninth plea. And for a further plea in this behalf, by leave of the court first had and obtained, the said defendants say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because protesting, as last aforesaid;
37 nevertheless, for further plea, they say that the said plaintiffs, to wit, at Hawlay aforesaid, to wit, in and during and at all times throughout the season of navigation upon the said canal, in the year 1863, did demand and exact from the said defendants, as a condition of their, the said plaintiff's, suffering or permitting boats laden with coal for transportation upon the said canal, by, for, or on account of the defendants, entering the said canal by the said railroad connecting therewith, at or near the mouth of the Wallenpaupack river, and to be transported upon the said canal by or for the said defendants, under and in pursuance of the agreement aforesaid, to pass down the said canal, or through the locks thereof, the payment by the defendants to the said plaintiffs, as and for toll upon and for the use of such canal in such transportation, of a much larger amount than the toll thereon stipulated and provided for in and by the agreements in the declaration mentioned, that is to say, a sum for such toll exceeding by fifty cents per ton the true amount of such toll specified in and computed according to the provisions of the said agreements; and that the said plaintiffs, to wit, at the place and times aforesaid, did wholly refuse to permit or allow any such boats so laden to pass down the said canal, or through the locks thereof, without the payment to them by the defendants of such excessive toll as last aforesaid, upon the coal contained therein; and the defendants further say that the said plaintiffs, to wit, at Hawley aforesaid, to wit, in and during and at all times throughout the season of navigation upon the said canal, in the year 1864, did demand and exact from the said defendants, as a condition of their, the said plaintiffs', suffering or permitting any boats laden with coal for transportation upon the said canal, by, for, or on account of the defendants, to pass down the said canal, or through the locks thereof, the payment by the defendants to the plaintiffs, as and for toll upon and for the use of the said canal in such transportation, of a much larger amount than the toll thereon stipulated and provided for in and by the agreements in the declaration mentioned, that is to say, a sum for such toll exceeding by one dollar per ton the true amount
38 of such toll specified in and computed according to the provisions of the said agreements; and that the plaintiffs, to wit, at the place and times last aforesaid, did wholly refuse to allow any such boats so laden to pass down the said canal, or through the locks thereof, without the payment to them by the defendants of such excessive toll as last aforesaid upon the coal contained therein; without this, that the said plaintiffs had been, or were at the several times in the declaration mentioned, or any or either of them, ready or willing to furnish to any or all boats owned or used by the defend-

ants for the purpose of transporting coal entering the said canal, by railroad connecting with the said canal at or near the mouth of the Wallenpaupack river, to wit, by the railroad of the defendants in the said declaration mentioned, or containing coal entering as aforesaid, belonging to or transported by or on account of the defendants, or containing coal entering as aforesaid, in which or the transporta- of which the said defendants were or might be interested, or the transportation of which, under the provisions of the said agreement, the defendants might authorize or require all the facilities of navigation and transportation which the said canal afforded, when in good navigable condition or repair, to boats owned or used by any other company or person, or belonging to or used by, or containing coal transported by, for, or on account of the plaintiffs, or any such facilities of navigation or transportation, to the extent of one-half of the whole capacity for transportation of the said enlarged canal, exclusive of the tonnage employed for the transportation of articles other than coal, or to any part of such extent, in respect of the coal which the defendants diverted from entering the said canal, to be transported thereon, as in the declaration mentioned, as the plaintiffs in their said declaration have alleged.

And this the defendants are ready to verify; wherefore they pray judgment whether the said plaintiffs their aforesaid action thereof against them ought to have or maintain, &c.

Amended tenth plea. And for a further plea in this behalf, by leave of the court first had and obtained, the said defendants
39 say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because protesting, as last aforesaid; they nevertheless say, for further plea as aforesaid, that the said plaintiffs, to wit, at Hawley, aforesaid, to wit, in and during, and at all times throughout, the respective seasons of navigation upon the said canal in the years 1863 and 1864, did demand and exact from the said defendants, as a condition of their, the said plaintiffs', suffering or permitting any boats laden with coal for transportation upon the said canal by, for, or on account of the defendants entering the said canal by the said railroad connecting therewith at or near the mouth of the Wallenpaupack river, and to be transported upon said canal, by and for the said defendants, under and in pursuance of the agreements aforesaid, to pass down the said canal, or through the locks thereof, the payment by the said defendants to the said plaintiffs, in addition to the toll per ton upon said coal, provided for by the terms of said agreement of a sum demanded and exacted by the plaintiffs, as and for toll upon the boats wherein such coal was contained, to wit, the sum of three cents for each ton of the burthen or capacity of every such boat for each mile of said canal which such canal should pass over, contrary to the tenor and effect, true intent and meaning of the agreements aforesaid; without this, that the said plaintiffs have been, or were, at the several times in the declaration mentioned, or any or either of them, ready and willing to furnish to any or all boats owned or used by the defendants for the purpose of transporting coal, entering the said canal by rail-

road connecting with the said canal at or near the mouth of the Wallenpaupack river, to wit, by the railroad of the defendants in the declaration mentioned, or containing coal, entering as aforesaid, belonging to or transported by, or on account of the defendants, or containing coal, entering as aforesaid, in which, or the transportation of which, the said defendants were or might be interested, or the transportation of which, under the provisions of the said agreements, the defendants might authorize or require all the facilities of navigation and transportation which the said canal afforded, when
40 in good navigable condition and repair, to boats owned or used by any other company or person, or belonging to or used by, or containing coal transported by, for, or on account of the plaintiffs, or any such facilities of navigation or transportation, to the extent of one-half of the whole capacity for transportation of the said enlarged canal employed for the transportation of articles other than coal, or to any part of such extent, in respect of the coal, by the defendants diverted from entering the said canal, to be transported thereon, as in the declaration mentioned, as the plaintiffs in their said declaration have alleged. And this the said defendants are ready to verify; wherefore they pray judgment whether the said plaintiffs their aforesaid action thereof against them ought to have or maintain, &c.

Amended eleventh plea. And for a further plea in this behalf, by leave of the court first had and obtained, the said defendants say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because protesting, as last aforesaid; nevertheless, for further plea, they say that the said plaintiffs, to wit, at Hawley aforesaid, to wit, in and during, and at all times throughout, the seasons of navigation upon the said canal, in the year 1863, did demand and exact from the said defendants, as a condition of their, the said plaintiffs', suffering or permitting any boats laden with coal for transportation upon the said canal, by, for, or on account of the defendants, entering the said canal by the said railroad, connecting therewith at or near the mouth of the Wallenpaupack river, and to be transported upon the said canal by and for the said defendants, under and in pursuance of the agreements aforesaid, to pass down the said canal, or through the locks thereof, the payment by the defendants to the said plaintiffs, as and for toll upon and for the use of such canal in such transportation, of a sum for each ton of said coal alleged by the plaintiffs to be fixed upon the basis of, and according to, a pretended ascertainment by the said plaintiffs, on the first day of May, in said year, of the quantity of lump coal of the said plaintiffs, which at that time had been sold to them, to be delivered at Rondout, and to arrive by the said canal during
41 the said calendar year, and a pretended ascertainment by the plaintiffs, as aforesaid, of the average price at which such sales had been contracted, and a pretended statement and estimate by the plaintiffs of the whole amount of their estimated sales of such lump coal for said year, upon and as the result of which pretended estimates and ascertainments the plaintiffs claimed to be entitled to de-

mand and have from the defendants a toll of a large amount, to wit, one dollar and thirty-five cents and three-fourths of a cent per ton, for each and every ton transported by or for account of these defendants upon the said canal, under the said contract, during the year 1863; and the said plaintiffs, to wit, at Hawley aforesaid, to wit, in and during, and at all times throughout, the season of navigation upon the said canal, in the year 1863, did wholly refuse to suffer or permit any boats whatsoever laden with coal for transportation, upon the said canal, by, for, or on account of the defendants, entering such canal by the said railroad aforesaid, and to be transported by or for these defendants, under the said contract, to pass down the said canal, or through the locks thereof, without the payment of them by the defendants, of the toll by the plaintiffs claimed to have been ascertained, and by them demanded thereon, as last aforesaid, to wit, the sum of one dollar and thirty-five cents and three-fourths of a cent for each ton of said coal; and these defendants further say that the whole fairly estimated extent of the sales of the lump coal of the said plaintiffs for such year 1863 was a large amount, to wit, six hundred thousand tons of coal, to wit, on the first day of May, 1863, to wit, at Hawley aforesaid, and that one-half of such estimated amount, which, by the terms of the said agreement, was required to have been sold by the first day of May, in order to entitle the plaintiffs to exact the present payment of tolls upon coal transported by the defendants under said contract during the season of navigation in said year was a large amount, to wit, three hundred thousand tons of coal, and that the quantity of lump coal of the said plaintiffs, which, up to and at the said first day of May, 1863, had been sold by the plaintiffs, to be de-
42 livered at Rondout, and to arrive by the said canal during the said calendar year, and upon the basis of the average price whereof the said toll for that year was claimed by the plaintiffs to be determined, and was by them demanded, as aforesaid, had been so sold by the plaintiffs to a great number of different persons, to wit, five hundred different persons, and in a great number of different parcels, to wit, five hundred different parcels, and by a great number, to wit, five hundred different contracts of sale, and that such contracts were in writing, and contained divers and varying conditions and provisions, and were at divers and varying prices, and that the plaintiffs were in possession of such contracts in writing, and of divers books, accounts, and documents, containing the particulars of all their said sales, the names of the respective purchasers, the quantities sold to each of them, and the prices at which such sales were respectively contracted, of all which premises the defendants were ignorant and uninformed, whereof the said plaintiffs, to wit, at the time and place last aforesaid, had notice; and that the said plaintiffs, although by the said defendants duly requested thereunto, to wit, on the first day of May, 1863, to wit, at Hawley aforesaid, and on divers other days and times between that day and the close of the season of navigation upon the said canal in the year 1863, to wit, at the place aforesaid, did not nor would disclose to the said defendants the names of the persons to whom such sales had

been made or contracted, or any of them, nor the prices at which such respective contracts, or any of them, had been made, nor any of the particulars of such sales or contracts, nor suffer or permit the said defendants to examine, inspect, or see the said contracts, or any of them, nor the said books, accounts, and documents, or any of them, but wholly neglected and refused so to do; and the said plaintiffs then, to wit, on the said first day of May, to wit, at Hawley aforesaid, and at all times during the season of navigation upon the said canal, in the year 1863, wholly suppressed and concealed from the said defendants all knowledge of the particulars of the sales of their lump coal, made or contracted by them during such calendar year,
43 upon the basis whereof they claimed and demanded toll upon 1
the defendants' transportation of coal for that year, under the said contract, as aforesaid, and all knowledge of the names of the names of the purchasers to whom such sales had been made or contracted, and of the prices at which such sales had been respectively contracted, and thereby prevented the ascertainment, according to the provisions of said agreement, of the amount of toll chargeable by the plaintiffs upon the coal transported by or for these defendants upon said canal during the season of navigation in 1863; and so the defendants say that at the said times when, during the season of navigation in the year 1863, the plaintiffs refused, as aforesaid, to permit passage upon the said canal of any boats employed in the transportation of coal for these defendants, under the said agreement, without the payment of the toll so demanded by the plaintiffs as a condition of permitting such boats to pass upon said canal, as aforesaid, there had been, and was, no ascertainment, according to the provisions of the said contract, of the amount of toll chargeable by the plaintiffs for the transportation of such coal under said agreement, which said refusal of the said plaintiffs was contrary to the tenor and effect, true intent and meaning, of the agreements aforesaid.

And the said defendants further say, that the said plaintiffs, to wit, at Hawley aforesaid, to wit, in and during and throughout the whole of the season of navigation upon the said canal in the year 1864, did demand and exact from the said defendants, as a condition of their, the said plaintiffs' suffering or permitting any boats laden with coal for transportation upon the said canal by, for, or on account of the defendants entering the said canal by the said railroad connecting therewith, at or near the mouth of the Wallenpaupack river, and to be transported upon the said canal by and for the said defendants, under, and in pursuance of, the agreements aforesaid, to pass down the said canal, or through the locks thereof, the payment by the defendants to the said plaintiffs as and for toll upon and for the use of such canal in such transportation, of a sum for each ton of said
44 coal alleged by the said plaintiffs to be fixed upon the basis of, and according to, a pretended ascertainment by the said plaintiffs, on the first day of May in said year 1864, of the quantity of lump coal of said plaintiffs, which at that time had been sold, to be delivered at Rondout, and to arrive by the said canal during the said

calendar year, and a pretended ascertainment by the plaintiffs, as aforesaid, of the average price at which such sales had been contracted, and a pretended statement and estimate by the plaintiffs of the whole amount of their estimated sales of such lump coal for said year, upon and as the result of which pretended estimates and ascertainments the plaintiffs claim to be entitled to demand and have from the defendants a toll of a large amount, to wit, two dollars and thirty cents and five-eighths of a cent per ton, for each and every ton of coal transported by or for account of these defendants upon the said canal, under the said contract, during the year 1864; and the said plaintiffs, to wit, at Hawley aforesaid, to wit, in and during, and at all times throughout the season of navigation, upon the said canal, in the year 1864, did wholly refuse to suffer or permit any boats whatever, laden with coal for transportation upon the said canal, by for, or on account of the defendants, entering such canal by the railroad aforesaid, and to be transported by or for these defendants under the said contract, to pass down the said canal or through the locks thereof, without the payment to them by the defendants of the toll demanded thereon as last aforesaid, to wit, the sum of two dollars and thirty cents and five-eights of a cent for each ton of such coal. And these defendants further say, that the fairly estimated extent of the sales of the lump coal of the said plaintiffs for such year 1864, was a large amount, to wit, six hundred thousand tons of coal, to wit, on the first day of May, 1864, to wit, at Hawley aforesaid, and that the one-half of such estimated amount, which, by the terms of the said agreement, was required to have been sold by the said first day of May, in order to entitle the plaintiffs to exact the present payment of tolls upon coal transported by the defendants upon said canal under said contract, during the season of navigation in said year, was a large amount, to wit, three hundred thousand
45 tons of coal, and that the quantity of lump coal of the said plaintiffs, which up to and at the said first day of May, 1864, had been sold by the plaintiffs, to be delivered at Rondout, and to arrive by the said canal during the said calendar year, and upon the basis of the average price whereof the said toll for that year was claimed by the plaintiffs to be determined, and was by them demanded as aforesaid, had been so sold by the plaintiffs to a great number of different persons, to wit, five hundred different persons, and in a great number of different parcels, to wit, five hundred different parcels, and by a great number, to wit, five hundred different contracts of sale, and that such contracts were in writing, and contained divers and varying conditions and provisions, and were at divers and varying prices, and that the plaintiffs were in possession of such contracts in writing, and of divers books, accounts, and documents, containing the particulars of all the said sales, the names of the respective purchasers, the quantities sold to each of them, and the prices at which such sales were respectively contracted, of all which premises the defendants were ignorant and uninformed, whereof the said plaintiffs, to wit, at the time and place last aforesaid, had notice; and that the said plaintiffs, although by the said defendants

duly requested thereunto, to wit, on the first day of May, 1864, to wit, at Hawley aforesaid, and on divers other days and times between that day and the close of the season of navigation upon the said canal, in the year 1864, to wit, at the place aforesaid, did not, nor would, disclose to the said defendants the names of the persons to whom such sales had been made or contracted, or any of them, nor the prices at which such respective contracts, or any of them, had been made, nor any of the particulars of such sales or contracts, nor suffer or permit the said defendants to examine, inspect, or see the said contracts, or any of them, nor the said books, accounts and documents, or any of them, but wholly neglected and refused so to do; and the said plaintiffs then, to wit, on the said first day of May,

1864, to wit, at Hawley aforesaid, and at all times during the
46 season of navigation upon the said canal, in the year 1864, wholly suppressed and concealed from the said defendants all knowledge of the particulars of the sales of their lump coal, made or contracted by them during such calendar year, upon the basis whereof they claimed and demanded toll upon the defendants' transportation of coal for that year, under the said contract as aforesaid, and all knowledge of the names of the purchasers to whom such sales had been made or contracted, and of the prices at which such sales had been respectively contracted, and thereby prevented the ascertainment according to the provisions of said agreement, of the amount of toll chargeable by the plaintiffs upon the coal transported by or for these defendants upon said canal, during the season of navigation in 1864, and so the said defendants say, that at the said times, when during the season of navigation, in the year 1864, the plaintiffs refused, as aforesaid, to permit the passage upon said canal of any boats employed in the transportation of coal for these defendants under the said agreement, without the payment of the toll demanded by the plaintiffs as a condition of permitting such boats to pass upon said canal, as aforesaid, there had been, and was, no ascertainment, according to the provisions of the said contract, of the amount of toll chargeable by the plaintiffs for the transportation of such coal, under said agreement, which said refusal of the said plaintiffs was contrary to the tenor and effect, true intent and meaning, of the agreements aforesaid; without this, that the said plaintiffs have been, or were, at the several times in the declaration mentioned, or any or either of them, ready and willing to furnish to any or all boats owned or used by the defendants for the purpose of transporting coal, entering the said canal by railroad, connecting with the said canal, at or near the mouth of the Wallenpaupack river, to wit, by the railroad of the defendants in the said declaration mentioned, or containing coal entering as aforesaid, belonging to, or transported by, or on account of, the defendants, or containing coal entering as aforesaid, in which, or the transportation of which, the said defendants were, or might be interested, or the transportation of which, under the provisions
47 of the said agreements, the defendants might authorize or require all the facilities of navigation and transportation which the said canal afforded when in good navigable condition and repair,

to boats owned or used by any other company or person, or belonging to or used by, or containing coal transported by, for, or on account of the plaintiffs, or any such facilities of navigation or transportation, to the extent of one-half of the whole capacity for transportation of the said enlarged canal, exclusive of the tonnage employed for the transportation of articles other than coal, or to any part of such extent, in respect of the coal, by the defendants diverted from entering the said canal, to be transported thereon, as in the declaration mentioned, as the plaintiffs in their said declaration have alleged. And this the said defendants are ready to verify, wherefore they pray judgment whether the said plaintiffs their aforesaid action thereof against them ought to have or maintain, &c.

Amended twelfth plea. And for a further plea in this behalf, by leave of the court first had and obtained, the said defendants say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because, protesting as last aforesaid; nevertheless, for further plea, they say that the said plaintiffs, to wit, at Hawley aforesaid, to wit, in and during, and at all times throughout, the season of navigation upon the said canal, in the year 1863, did demand and exact from the said defendants, as a condition of their, the said plaintiffs' suffering or permitting any boats laden with coal for transportation upon the said canal, by, for, or on account of the defendants, entering the said canal by the said railroad, connecting therewith at or near the mouth of the Wallenpaupack river, and to be transported upon the said canals, by or for the said defendants, under and in pursuance of the agreements aforesaid, to pass down the said canal, or through the locks thereof, the payment by the defendants to the plaintiffs, as and for toll, upon and for the use of such canal in such transportation, of a sum for each ton of said coal, alleged by the said plaintiffs to be fixed upon the basis of, and according to, a pretended ascertainment by the said plaintiffs, on the first day of May, in said year, of the quantity of lump coal, of
48 the said plaintiffs, which at that time had been sold by them, to be delivered at Rondout, and to arrive by the said canal during the said calendar year, and a pretended ascertainment by the plaintiffs, as aforesaid, of the average price at which such sales had been contracted, and a pretended statement and estimate by the plaintiffs of the whole amount of their estimated sales of such lump coal for said year, upon and as the result of which pretended estimates and ascertainments the plaintiffs claimed to be entitled to demand, and have from the defendants a toll of a large amount, to wit, one dollar and thirty-five cents and three-fourths of a cent per ton, for each and every ton of coal transported by or for account of these defendants upon the said canal, under the said contract, during the year 1863, and the said plaintiffs, to wit, at Hawley aforesaid, to wit, in and during, and at all times throughout, the season of navigation, upon the said canal, in the year 1863, did wholly refuse to suffer or permit any boats whatsoever, laden with coal, for transportation upon the said canal, by, for, or on account of the defendants, entering such canal by the railroad aforesaid, and to be transported by or for these defendants,

under the said contract, to pass down the said canal, or through the locks thereof, without the payment to them by the defendants of the toll by the plaintiffs claimed to have been ascertained and by them demanded thereon, as last aforesaid, to wit, the said sum of one dollar and thirty-five cents and three-fourth of a cent for each ton of said coal. And these defendants further say, that the said amount of toll, so by the plaintiffs claimed to have been ascertained, and so by them demanded and exacted as such condition, as aforesaid, was erroneous and excessive, in this, to wit, that in such pretended ascertainments and statement of sales, upon the average price whereof the said sum demanded by the plaintiff as toll was based and pretended to be calculated, as aforesaid, the plaintiffs had reckoned and included large quantities of coal by them sold, to wit, one hundred thousand tons of coal, not being of the description, lump coal, referred to in said contract, but being of another description of coal, to wit, steamer coal, and which had been
49 sold by the said plaintiffs at higher average prices, to wit, twenty-five cents per ton higher than the average prices of the lump coal of the said plaintiffs, sold by them and included in the said ascertainment and average; and also in this, to wit, that the said plaintiffs, in contracting their sales during the said calendar year of 1863, up to the first day of May, of their lump coal, to arrive by said canal at Rondout during the said calendar year, had, in evasion and fraud of the true intent and meaning of the agreement aforesaid, and for the fraudulent purpose of unduly enhancing the toll chargeable to the defendants for the transportation of their coal upon the said canal during said year 1863, under the said agreements, in divers, to wit, fifty separate instances of contracts of sales for large quantites of their said coal, each to a single purchaser, at prices much lower, to wit, forty cents per ton lower than the average prices of their sales of their coal of such description during the same period, wrongfully so shaped the said contracts as to make such coal deliverable by them to such purchaser at points in tide-water other than Rondout, and to that end to assume themselves the transportation of such coal from Rondout to the point where the same was stipulated to be delivered, charging, and by said contract stipulating for an additional price for such coal, by reason of such transportation beyond Rondout; whereas by the uniform usage of the plaintiffs up to, and at the time of, the making of the said agreements, and in reference to which such agreements were entered into, the coal sold by the plaintiffs had always been made deliverable at Rondout, and the price thereof had been and was fixed as for delivery at Rondout, and when the same was agreed to be transported by the said plaintiffs to ports in tide-water beyond Rondout, the usage had always been and was, for the plaintiffs to be compensated therefor by a separate charge for freight for such additional transportation, in addition to the price fixed for the coal as delivered at Rondout; and the defendants say that, by means of such evasion and colorable device, the plaintiffs, in their said pretended ascertainment of the average price of their sales of lump coal up to the first day of May,

1863, upon the basis whereof the said toll by them claimed
50 was pretended to be calculated, had excluded and did exclude from the average the large sales which were, in fact, contracted at the lower prices, and made up such average upon only the sales made of the smaller parcels at the higher prices, and that by means thereof, and of the inclusion of sales of coal, not being lump coal, as aforesaid, the plaintiffs in such pretended average and ascertainments, unduly enhanced the amount of toll by them demanded, and pretended to be ascertained, as aforesaid, to a large extent, to wit, to the extent of an excess of twenty cents per ton, contrary to the tenor and effect, true intent and meaning of the agreement aforesaid. And the said defendants further say, that the said plaintiffs, to wit, at Hawley aforesaid, to wit, in and during the season of navigation upon the said canal, in the year 1864, did demand and exact from the said defendants, as a condition of their, the said plaintiffs', suffering or permitting any boats, laden with coal, for transportation upon the said canal, by, for, or on account of the defendants', entering the said canal by the said railroad, connecting therewith at or near the mouth of the Wallenpaupack river, and to be transported upon the said canal by and for the said defendants, under and in pursuance of the agreements aforesaid, to pass down the said canal, and through the locks thereof, the payment by the said defendants to the plaintiffs, as and for toll, upon and for the use of such canal in such transportation, of a sum for each ton of said coal alleged by the said plaintiffs to be fixed and ascertained and calculated by them, as the amount of such toll per ton for said year, under and in pursuance of the said agreement in that behalf, upon the basis of, and according to a pretended ascertainment by the plaintiffs, on the first day of May, in said year, of the quanity of lump coal of the said plaintiffs, which at that time had been sold by them, to be delivered at Rondout, and to arrive by the said canal, during the said calendar year, and a pretended ascertainment by the plaintiffs, as aforesaid, of the average price at which such sales had been contracted, and a pretended statement and estimate by the plaintiffs of the whole amount of the estimated sales of such lump coal for said year, upon and as the result
51 of which pretended estimates, ascertainments, and calculations the plaintiffs claimed to be entitled to demand, and have from the defendants a toll of a large amount, to wit, two dollars and thirty cents and five-eighths of a cent per ton, for each and every ton of coal transported by or for account of these defendants upon the said canal, under the said contract, during the year 1864; and the said plaintiffs, to wit, at Hawley aforesaid, to wit, in and during, and at all times throughout, the season of navigation upon the said canal, in the year 1864, did wholly refuse to suffer or permit any boats whatever, laden with coal for transportation upon the said canal, by, for, or on account of the defendants, entering such canal by the railroad aforesaid, and to be transported by or for these defendants under the said contract, to pass down the said canal, or through the locks thereof, without the payment

to them, by the defendants, of the toll by the plaintiffs claimed to have been ascertained, and by them demanded thereon, as last aforesaid, to wit, the said sum of two dollars and thirty cents and five-eights of a cent for each ton of said coal.

And the defendants further say, that the sum which was so demanded and exacted for such toll by the plaintiffs, as such condition, was in excess of the amount chargeable by the plaintiffs for such toll by and according to the said agreements, to a large extent, to wit, to the extent of twenty cents per ton, in this, to wit, that by the said pretended estimates, ascertainments, and calculations of the plaintiffs, whereon the same was founded, the plaintiffs had unduly enhanced the amount of such toll by the like errors, devices, and evasions as are in this plea above set forth, in respect of the toll claimed, demanded, and exacted by the plaintiffs, as aforesaid, in the year 1863; and so the defendants say, that the said refusal of the plaintiffs to allow the passage of boats employed in the transportation of coal for these defendants upon the said canal, under the said agreement, during the seasons of navigation upon the said canal, in the years 1863 and 1864, respectively, without the payment of the sum so demanded and exacted by the plaintiffs as such condition, as aforesaid, was contrary to the tenor and effect, true intent and meaning of the agreements
52 aforesaid; without this, that the said plaintiffs have been or were at the several times in the declaration mentioned, or any or either of them, ready or willing to furnish to any or all boats owned or used by the defendants for the purpose of transporting coal, entering the said canal by railroad, connecting with the said canal, at or near the mouth of the Wallenpaupack river, to wit, by the railroad of the defendants, in the declaration mentioned, or containing coal, entering as aforesaid, belonging to, or transported by, or on account of, the defendants, or containing coal, entering as aforesaid, in which, or the transportation of which, the said defendants were or might be interested, or the transportation of which, under the provisions of the said agreements, the defendants might authorize or require all the facilities of navigation and transportation which the said canal afforded when in good navigable condition and repair, to boats owned or used by any other company or person, or belonging to, or used by, or containing coal transported by, for, or on account of the plaintiffs, or any such facilities of navigation or transportation, to the extent of one-half of the whole capacity for transportation of the said enlarged canal, exclusive of the tonnage employed for the transportation of articles other than coal, or to any part of such extent, in respect of the coal by the defendants diverted from entering the said canal, to be transported thereon, as in the declaration mentioned, as the plaintiffs in their said declaration have alleged.

And this the said defendants are ready to verify; wherefore they pray judgment whether the said plaintiffs their aforesaid action thereof against them ought to have or maintain, &c.

Amended thirteenth plea. And for a further plea in this behalf, by leave of the court first had and obtained, the said defendants say, that the said plaintiffs ought not to have or maintain their aforesaid

action thereof against them, because protesting, as last aforesaid; nevertheless, for further plea, they say that the said plaintiffs, to wit, at Hawley aforesaid, to wit, in and during and at all times
53 throughout the respective seasons of navigation upon the said canal in the years 1863 and 1864, did demand and exact from the said defendants, as a condition of their, the said plaintiffs', suffering or permitting any boats laden with coal for transportation upon the said canal, by, for, or on account of the said defendants, entering the said canal by the said railroad, connecting therewith at or near the mouth of the Wallenpaupack river, and to be transported upon the said canal by or for the said defendants, under and in pursuance of the agreements aforesaid, to pass down the said canal, or through the locks thereof, the payment by the defendants to the plaintiffs, as and for toll upon and for the use of such canal in such transportation, of a certain sum for each ton of said coal; that is to say, one dollar and thirty-five cents and three-fourths of a cent per ton, in and during the said season of 1863, and two dollars and thirty cents and five-eighths of a cent per ton, in and during the said season of 1864, which sums, respectively, were alleged by the said plaintiffs to be fixed upon the basis of and according to certain pretended ascertainments by the said plaintiffs on the first day of May, in said years, respectively, of the quantity of lump coal of the said plaintiffs, which, at such time, had been sold by them to be delivered at Rondout, and to arrive by the said canal during the said calendar year, and pretended ascertainments by the plaintiffs, as aforesaid, of the average price at which such sales had been contracted, and pretended statements and estimates by the said plaintiffs, on such first day of May, in each of such years, of the whole amount of their estimated sales of such lump coal for said year, by which said pretended estimates the plaintiffs did allege and make out that the quantity of such lump coal of the said plaintiffs, which, up to such first day of May, in each of said years, had been so sold by them to be delivered at Rondout, and to arrive by the said canal during each of such calendar years, was more than one-half of the whole quantity of their estimated sales of such lump coal for said year, as they, the said plaintiffs, estimated such quantity; and the said plaintiffs, to wit, at Hawley aforesaid, to wit, in and during and at all times throughout the respective seasons of
54 navigation upon the said canal, in the said years 1863 and 1864, respectively, did wholly refuse to suffer or permit any boats whatsoever, laden with coal for transportation upon the said canal, by, for, or on account of the defendants, entering such canal by the railroad aforesaid, and to be transported by or for these defendants, under the said contract, to pass down the said canal, or through the locks thereof, without the payment to them by defendants of the tolls demanded and claimed by the plaintiffs thereon, as last aforesaid, to wit, the sum of one dollar and thirty-five cents and one-fourth of a cent per ton, in the year 1863, and the sum of two dollars and thirty cents and five-eighths of a cent per ton, in the year 1864. And the said defendants, in fact, say, that the said pretended estimates by the said plaintiffs, as last aforesaid, of the whole amount or quantity

of their estimated sales of such lump coal for such respective years, 1863 and 1864, were not made fairly or in good faith, but were colorable and fictitious; and that in each of such years, 1863 and 1864, the quantity of their lump coal, which the said plaintiffs, up to and on said first day of May, had sold to be delivered at Rondout, and to arrive by the said canal during the said calendar year, was less than one-half the quantity of such lump coal, which the plaintiffs, at the time of making such pretended estimates, respectively, to wit, on said first day of May, in each of said years, in fact, intended and expected to, and, in truth, estimated that they would sell, to be delivered at Rondout, and to arrive by said canal during such calendar year, by reason whereof the plaintiffs, by and according to the terms of the said agreement, were not, during the said years 1863 and 1864, respectively, entitled to exact the payment of any tolls upon the coal transported upon the said canal by or for these defendants, under said contracts, during the seasons of navigation in said years, respectively, until the amount of such toll could be ascertained, upon an average, of all such sales for the year; and so the defendants say that such refusals of the said plaintiffs, during the said seasons of navigation in the years 1863 and 1864, respectively, to permit the passage upon said canal of boats engaged in the transportation of coal thereon
55 for these defendants, under the said contract, without the payment to the plaintiffs of the sums, respectively, so demanded and exacted by the plaintiffs, as a condition of allowing such boats to pass, as aforesaid, was contrary to the tenor and effect, true interest and meaning of the said agreement; without this, that the said plaintiffs have been, or were, at the several times in the declaration mentioned, or any or either of them, ready or willing to furnish to any or all boats owned or used by the defendants for the purpose of transporting coal, entering the said canal by railroad connecting with the said canal at or near the mouth of the Wallenpaupack river, to wit, by the railroad of the defendants in the declaration mentioned, or containing coal entering as aforesaid, belonging to or transported by or on account of the defendants, or containing coal entering as aforesaid, in which, or the transportation of which, under the provisions of the said agreements, the defendants might authorize or require all the facilities of navigation or transportation which the said canal afforded when in good navigable condition and repair, to boats owned or used by any other company or person, or belonging to or used by, or containing coal transported by, for, or on account of the plaintiffs, or any such facilities of navigation or transportation, to the extent of one-half of the whole capacity for transportation of the said enlarged canal, exclusive of the tonnage employed for the transportation of articles other than coal, or any part of such extent, in respect of the coal by the said defendants diverted from entering the said canal, to be transported thereon, as in the declaration mentioned, as the plaintiffs in their said declaration have alleged, and this the said defendants are ready to verify; wherefore they pray judgment whether the said plaintiffs their aforesaid action thereof against them ought to have or maintain, &c.

I, Charles F. Southmayd, a counsellor of this court, do hereby certify that in my opinion the foregoing amended special pleas are well founded.

March 29, 1866.

CHAS. F. SOUTHMAYD,
Of Counsel.

56 *Notice under general issue.*

GENTLEMEN: Please take notice that, under the plea of non est factum above pleaded, the defendants, upon the trial of this action in bar of the plaintiffs' recovery, will insist upon and give in evidence, that in and by the act of the legislature of the State of New York, entitled "An act to incorporate the President, Managers and Company of the Delaware and Hudson Canal Company," passed April 23d, 1823, in the declaration mentioned, under and by virtue of which the plaintiffs constructed and maintained so much of the Delaware and Hudson Canal as is situate in the State of New York, it was and is provided in respect of the said canal, and the use thereof, as follows, that is to say:

And be it further enacted, that it shall and be lawful for the managers of the said company, as soon as the said canal and navigation, or any fifteen miles thereof, shall be completed, so as to allow of the passage of boats, to appoint such and so many collectors of tolls for the passage of boats and vessels, in and through the same and in such places as they shall think proper, and that it shall and may be lawful for such collector of tolls and their deputies to demand and receive of and from the persons having charge of any boat, ark, craft, raft, or other vessels, passing through the said canal and navigation, such toll and rates as the said managers shall think proper, at any lock or other convenient place, provided that the said toll shall not, in the whole, exceed the rate of eight cents per mile for every ton weight of the ascertained burthen or capacity of any boat, ark, craft, or vessel laden with, or engaged in the transportation of, stone, coal, and one half that sum for every ton weight of the ascertained burthen or capacity of any boat, craft, ark, or vessel, laden with, or engaged in the transportation of, any other article of merchandise, and the same for every hundred feet, cubic measure, of timber, and one thousand feet, board measure, of boards, plank, or scantling, and for every five thousand shingles, and so in proportion for any other distance and less number of locks.

And be it further enacted, that it shall be the duty of the master or commander of any boat, ark, raft, or vessel passing
57 through said navigation, when he shall arrive within one-fourth of a mile from any lock erected in said navigation, under the penalty of two dollars, to blow a trumpet or horn, whereupon the keeper of such lock shall attend for the purpose of opening the gate or sluice to let the said boat, ark, raft, or other vessel pass, without any unnecessary delay and in safety; and if any boat, ark, raft, or other vessel shall be prevented from passing up or down any of said

locks or sluices, by reason of the lock being not raised, for more than thirty minutes, the said corporation shall, on conviction thereof, before any justice of the peace of the proper county, forfeit and pay to the person so hindered the sum of one dollar for every thirty minutes beyond the said time that he shall be so prevented, and in the same proportion for any longer or shorter time, and the service of any civil process upon the toll gatherer, in the proper county, and next to the place where the offence shall have been committed, shall be held as good and as available in law as if served upon the president of the said corporation.

And be it further enacted, that if the said corporation shall neglect or refuse to keep in repair and good order any dam, lock, or sluice of their own construction, or shall neglect to remove any obstacle which may occur, so that boats, arks, rafts, or other vessels may safely use said navigation in the manner provided by this act, the said corporation shall, for every such offence, forfeit and pay the sum of one hundred dollars, to be sued for and recovered in any court of competent jurisdiction, one-half to the use of the informer and the other half to the use of the poor of the township or county where the neglect may occur, and the service of process upon the toll gatherer in the proper county, and next to the place where the offence shall have been committed, "shall be held as good and as available in law as if served on the president of the said corporation."

And that in and by act of the legislature of the State of Pennsylvania, entitled "An act to improve the navigation of the river Lackawaxen," passed March 13, 1823, in the declaration mentioned, under and by virtue of which, and of the other acts supplemental
58 thereto and amendatory thereof, and of a transfer and conveyance by Maurice Wurts to the plaintiffs of the rights vested in him, his heirs and assigns, by said act of the legislature of Pennsylvania, the plaintiffs had constructed and maintained so much of the Delaware and Hudson canal as is situate in the State of Pennsylvania, it was and is provided, in respect of the said canal and the use thereof, as follows, that is to say:

And be it further enacted by the authority aforesaid, that the lock shall be in the clear at least eighteen feet wide, and sixty-four in length, and it shall be the duty of the master or commander of any boat, ark or other vessel, passing said navigation, when he shall arrive within one fourth of a mile from any lock so erected, under the penalty of two dollars, to blow a trumpet or horn, whereupon the keeper of such lock shall attend for the purpose of opening the gate or sluice, to let the said boat, ark, or other vessel, pass without unnecessary delay, and in safety; and if any boat, ark, or other vessel shall be prevented from passing up or down any of said locks or sluices, by reason of the lock not being raised, for more than thirty minutes, the said Maurice Wurts, his heirs and assigns, shall, on conviction thereof, before any justice of the peace of the proper county, forfeit and pay to the person so hindered the sum of one dollar for every thirty minutes beyond the said time that he shall be so prevented, and in the same proportion for any longer or shorter time; and

the service of any civil process upon the the toll gatherer in the proper county, and next to the place where the offence shall have been committed, shall be held as good, and as available in law, as if served upon the said Maurice Wurts, his heirs, and assigns.

And be it further enacted by the authority aforesaid, that if the said Maurice Wurts, his heirs, or assigns shall neglect or refuse to keep in repair and good order any dam, lock or sluice of their own construction, or shall neglect to remove any obstacle which may occur, so that boats, arks, rafts, or other vessels, may safely use said navigation, in the manner provided by this act, the said Maurice Wurts, his heirs and assigns, shall, for every offence, forfeit and pay the sum of one hundred dollars, to be recovered in the
59 same manner as debts of equal amount are by law recoverable before a justice of the peace of the proper county where the offence shall be committed, one half to the use of the informer, and the other half to the use of the poor of the township or county where the neglect may occur; and the service of process upon the toll gatherer in the proper county, and next to the place where the offence shall have been committed, shall be held as good and available in law as if served on the said Maurice Wurts, his heirs or assigns, provided that the payment of such penalty shall not be taken to exempt the said Maurice Wurts, his heirs or assigns, from their responsibility to any person who may be injured by such refusal or neglect."

And that at the several times in the declaration mentioned the said canal of the plaintiffs, known as the Delaware and Hudson Canal, was a common and public highway for the passage of all canal boats, whether with or without cargoes, upon payment of the tolls legally demandable by the plaintiff, and that at all such times the owners of, or parties interested in, or navigators of, any and all canal boats, whether containing cargoes of coal, or other cargoes, or being without cargo, were lawfully, and of right, entitled to use said canal as such common and public highway, and to navigate such boats, either with or without cargo, as aforesaid, in upon, and through the said canal, upon condition only of paying such tolls as were lawfully and rightfully demandable and demanded by the plaintiffs thereon.

And the plantiffs will further insist upon and give in evidence, as aforesaid, that the resolutions adopted by the plaintiffs, through their board of managers, on the twenty-eighth day of April, one thousand eight hundred and forty-seven, which are recited and referred to in the agreement in writing, bearing date August 31st, 1847, in the said declaration set forth, were in the words and figures following, to wit:

At a meeting of the board of managers of the Delaware and Hud-
son Canal Company, held on the 28th day of April, 1847,
60 present, the president, and Messrs. Stout, Heriman, Hitchcock, Holmes, Le Roy, Hawley, Young, Platt, vice president.

The minutes of the last meeting were read and approve.

The committee appointed at the last meeting to prepare a tariff of tolls presented a report, of which the following is a copy.

The committee to whom was referred, on the 24th of April instant, the duty of preparing a tariff of tolls on coal and other articles that may hereafter be transported on the company's canal, entering it from a railroad or railroads that may be connected with it, at or near the mouth of the Wallenpaupack river, respectfully report: That they recommend, in reference to the article of coal, the adoption with some modification, of a tariff prescribed in the proceedings of this board on the 27th of January, 1846, in which it is provided that, on the first day of May, in each and every year, the quantity of lump coal sold by the Delaware and Hudson Canal Company, to arrive during that year by canal, shall be ascertained, and also the average price per ton of such sales, and that price shall be taken as the value of coal for that year, by which the canal toll on it is to be regulated during the year, on all coal coming to the canal by the proposed road or roads. If such sales shall not average above three dollars and fifty cents per ton, delivered at Rondout, then the toll for that year shall not exceed one-sixth of such average price, whatever it may be; and if the sales shall average above three dollars and fifty cents per ton, delivered at Rondout, then the toll for that year shall not exceed one-fifth of such average price, whatever it may be. For example; if the sales shall average, say three dollars per ton, the toll for the year would be fifty cents per ton.

If $3 15,	the toll for the	year	would be	52½	cents	per ton.
3 25,	"	"		54 1-6	"	"
3 30,	"	"		55	"	"
3 36,	"	"		56	"	"
3 40,	"	"		56 2-3	"	"
3 50,	"	"		58 1-3	"	"
3 51,	"	"		70 1-5	"	"
3 60,	"	"		72	"	"
3 70,	"	"		74	"	"
3 75,	"	"		75	"	"

61 And so of any intermediate or other average price; but in no event shall the tolls be less than fifty cents per ton. Should the company hereafter increase the capacity of boats navigating the canal, by an enlargement of the locks or otherwise, so as to reduce the rate of freight previously paid on coal, the company reserves to itself the right to add the amount of such reduction per ton on freight to the above rate of toll.

The committee deem it inexpedient to fix any definite period of time for the continuance of the above rate of toll; such a limitation would operate as a discouragement and hindrance to those who may be disposed to make a railroad communication with the canal, and perhaps prevent it entirely. Nor do the committee deem it expedient to comprehend in the proposed tariff any article except coal. The company itself deals in no other, and hence there cannot be any just grounds of apprehension that an unreasonable toll will be exacted. There has never been any dissatisfaction expressed in regard to the canal tariff generally, and as articles coming to the canal by the pro-

posed new road or roads would be subject to the same tariff as articles passing back and forth between Honesdale and tide-water, it is thought by the commmittee that this branch of the subject requires no special action by the board at present. At any rate, there are but two articles (iron and lime-stone) in relation to which any modification of the general canal tariff would, in the opinion of the committee, be admissable, and it will be time enough to make such a modification, if at all, when there shall be further evidence of its propriety. The committee submit for the consideration of the board the following resolutions, as a part of their report, to wit:

Resolved, That the foregoing tariff on coal, entering this company's canal by any railroad or railroads that may be connected with it, at or near the mouth of the Wallenpaupack river, be, and the same is hereby, approved and adopted, and the faith of the company is hereby pledged for the observance of the same, subject to the right of advance reserved in the body of this report in case of a reduction in freight, in the manner therein contemplated.

62 Resolved, That the foregoing tariff on coal is offered to create motive and inducement for capitalists to invest their funds in the construction of a railroad or railroads to be connected with the canal of this company, at or near the mouth of the Wallenpaupack river, and is, therefore, to have no relation to or bearing on the toll to which coal will be subject that may come to the canal by the company's own railroad.

(Signed) JOHN WURTS,
" SILAS HOLMES,
" IRAD HAWLEY,
Committee.

It was moved and seconded that the report be received and adopted; and, after discussion and consideration of the same, it was unanimously agreed to.

And that the negotiation which was had between the said the Wyoming association and the plaintiffs, as mentioned in the said agreement in writing, bearing date August 31st, 1847, in the declaration mentioned, was so had by and through committees of conference, appointed by the said parties respectively, under and in pursuance of certain resolutions passed by the board of managers of the said the Wyoming association, on the 13th day of July, 1847, and by them communicated to the plaintiffs, which were in the words and figures following, that is to say:

Whereas the tariff of tolls proposed by the Delaware and Hudson Canal Company, for transportation on its canal, is not such as, without modification and more definite settlement, would warrant the association in constructing a railroad to connect with said canal; and,

Whereas this association believes that it is practicable to arrange this tariff in such manner as to make it mutually advantageous:

Resolved, That the board of directors of the Delaware and Hudson Canal Company be requested to appoint a committee to confer with a committee of this association on the subject.

Resolved, That Mr. Havemeyer, Mr. A. G. Stout, and Mr. William H. Falls be a committee on the part of the association to meet the committee of the Delaware and Hudson Canal Company, if one be appointed.

63 And that the resolution adopted by the managers of the said plaintiffs, on the fifteenth day of July, eighteen hundred and forty-seven, which is recited and referred to in the said agreement, in writing, bearing date August 31st, 1847, in the declaration mentioned, was in the words and figures following, to wit:

NEW YORK, *July 15th*, 1847.

The board met pursuant to adjournment.

The minutes of the last meeting were read and approved. The committee appointed to meet the committee of the Wyoming Coal Association reported that they had a conference with that committee during the interval of adjournment, and the subject of a canal tariff on coal was discussed. The committee of the association did not submit any definite proposition on the subject; but, from views presented by them, your committee were induced to present to the committee of the association the following proposition, to wit:

As the basis of an arrangement between the Delaware and Hudson Canal Company and the Wyoming Coal Association, it is proposed that the probable prospective cost of coal delivered at Roundout from the Lackawanna or Wyoming valley shall be assumed at two dollars and fifty cents per ton; then, to ascertain the toll to be paid by the association to the Delaware and Hudson Canal Company, the sales of lump coal in each and every year, up to the first day of May, to be delivered at Rondout, shall be ascertained, and the average price per ton of such sales shall be also ascertained, and half the difference between that and the cost of the coal, say $2.50 per ton, to be paid by the association during the year: Provided, however, that this stipulated toll shall not extend beyond 400,000 tons in any one year.

This proposition, however, was not satisfactory to the committee of the association, and on their part they were not prepared to submit one, but said they were unanimous in naming $2.60 as the proper sum to be assumed as the cost of coal at Rondout, for the purpose of an agreement in regard to tolls; no agreement, however, was come to between the two committees, as a basis of a report to their

64 constituents, but the committee of the associates withdrew from the conference with the proposition of this committee, to be further considered by the committee of the association or their principals.

The report of the committee was accepted, and it was then

Resolved, That the officers of this company be, and they hereby are, authorized to contract with the Wyoming Coal Association, in relation to toll on coal passing down the company's canal, from any railroad that such association may cause to be connected with the canal, at or near the mouth of the Wallenpaupack river, accord-

ing to the provisions of the proposition contained in the foregoing report.

And that the rights, privileges, and purchases which had been granted to the defendants by the State of Pennsylvania, had not been so granted with the design that the city of New York, and other parts of the State of New York, might receive a supply of coal through the said canal of the said plaintiffs, as in the said declaration alleged; and that it is not true that, at the said time, when, &c., in the declaration mentioned, there was no other avenue than the said canal of the plaintiffs contemplated, by which the said the Wyoming association, or the defendants, could transfer their coal to market.

And that at the respective times of the making of the agreements in writing, in the declaration mentioned, it was not for the interest of the public, as well as of the plaintiffs, that the surplus capacity of the said canal for transportation should not remain unemployed, but should be used by other parties, and at the said respective times the circumstances and considerations in the said declaration in that behalf mentioned did not require that all arrangements for the use of the said canal by other parties should be of a permanent character as in that behalf alleged.

And that the defendants did not, under and in pursuance of the said agreement of August 31st, 1847, construct or put in operation a railroad leading from the coal mines of the said defend-
65 ants, to which the said contracts related, and in reference to which the same were made to the said canal, or connecting therewith; and that the plaintiffs did not, in reliance upon the covenants or undertakings of the defendants in their said agreement contained, enter upon the work of enlarging their said canal, or prosecute and complete the same; and that by or after such enlargement, the whole capacity of the said canal for transportation, in each and every season of navigation after the said enlargement, exclusive of the tonnage employed in the transportation of articles other than coal, was not increased to the extent of eighteen hundred thousand tons of coal, and that the one-half of such alleged increased capacity, to wit, nine hundred thousand tons, was not, by the terms of the said contracts, subject to be used by the defendants, and that the plaintiffs have not at all or any of the times in the declaration mentioned or referred to, reserved for the transportation of coal of the defendants, to be brought to the said canal, over the said railroad of the defendants, one-half of the whole capacity of the said canal for transportation, in each and every season, exclusive of the tonnage employed in the transportation of articles other than coal, or any part of the capacity of such enlarged canal, save what was actually used and employed in the transportation of coal on said canal for the defendants; and that the said defendants did not induce the New York and Erie Railroad Company to build a branch leading from its main railroad, so as to connect with the railroad of the defendants at the point where it connects with the said canal, and that such supposed branch railroad of the New York and Erie Railroad Company, in the declaration men-

tioned, did not, and does not, connect with the said railroad of the defendants, at the point where said railroad of the defendants connects with the said canal.

New York, *October 6th*, 1865.

Yours, &c.,

EVARTS, SOUTHMAYD & CHOATE,
Defendants' attorneys.

To Messrs. OWEN, GRAY & OWEN, *Pl'ff's Att'ys.*

66 *Similiter.*

And the said plaintiffs, as to the said pleas of the defendants by them firstly, thirdly, fourthly, fifthly, and sixthly above pleaded, and whereof they have put themselves upon the country, do the like, &c.

Demurrer to second plea.

And the said plaintiffs, as to the said plea of the defendants by them secondly above pleaded, say that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendants, and that they, the said plaintiffs, are not bound by law to answer the same. And this they, the said plaintiffs, are ready to verify. Wherefore, by reason of this insufficiency of the said plea in this behalf, the said plaintiffs pray judgment, and their damages by them sustained, on occasion of the said breach of covenant in the said declaration mentioned, to be adjudged to them, &c.

And the said plaintiffs, according to the form of the statute in such case made and provided, state and show to the court here the following to causes of demurrer to the said second plea, that is to say:

(1.) That the said defendants have not concluded their said plea by putting themselves upon the country, &c.

(2.) That the said defendants have not, in or by their said plea, confessed and avoided, or traversed and denied, that the defendants did, during the respective seasons of navigation of the years 1863 and 1864, divert from entering the canal of the plaintiffs, to be transported thereon, and did deliver to and cause to be transported by the branch railroad of the New Yord and Erie Railroad Company, a large quantity of coal, as in the declaration alleged.

(3.) That the said defendants have, in and by their said plea, tendered several immaterial issues, to wit, whether the resolutions, propositions, and negotiations between the plaintiffs and the Wyoming Coal Association were or were not, as in the said plea set forth;

67 and whether the franchises granted to the defendants were or were not granted with the design that the city and other parts of the State of New York might receive a supply of coal through the canal of the plaintiffs; and whether or not there was no other avenue than plaintiffs' canal contemplated, by which the said Wyoming Coal Association or the defendants could transport their coal to

market; and whether or not it was for the interest of the public, as well as of the plaintiffs, that the surplus capacity of the said canal should not remain unemployed but should be used by other parties; and whether or not the circumstances and considerations in the declaration mentioned, did not require that all arrangements for the use of the canal by other parties, should be of a permanent character; and whether or not the defendants did, under the contract of August 31, 1847, construct or put in operation a railroad leading from the coal mines of the defendants to the said canal, or connecting therewith; and whether or not the plaintiffs, in reliance upon the covenants and undertakings of the defendants, entered upon the work of enlarging their canal, and prosecuted and completed the same; and whether or not, by and after the said enlargement, the capacity of the said canal for transportation was increased to the extent of 1,800,000 tons of coal; and whether or not the one-half of such increased capacity was by the terms of the contracts subject to be used by the defendants; and whether or not the plaintiffs have at all, or any of the times in the declaration mentioned or referred to, reserved for the transportation of the coal of the defendants, to be brought to the said canal over the said railroad of the defendants, one-half the whole capacity of the said canal, for transportation in each and every season, exclusive of the tonnage employed in the transportation of articles other than coal, or any part of the capacity of such enlarged canal, save what was actually used and employed in the transportation of coal on the said canal for the said defendants; and whether or not the defendants induced the New York and Erie Railroad Company to build the branch road in the said plea referred to; and whether or not the said branch road connected with the railroad of the defendants, at the point where said railroad of the defendants connects with said canal.

68 (4.) That the said plea is double and multifarious; in this, that it contains two or more separate and distinct answers, and offers two or more and separate and distinct issues, to wit, the several answers and issues above mentioned, upon the aforesaid declaration of the plaintiffs, whereas only one issue could or ought to have been taken in the said plea upon the said declaration, or the matter therein contained.

(5.) That the said plea is evasive in its allegation; that the defendants did not, under and in pursuance of the said agreement of August 31, 1847, construct and put in operation a railroad leading from the coal mines of the defendants, to which the said contracts related, and in reference to which the same were made to the said canal, or connecting therewith; and in its allegation that the plaintiffs did not, in reliance upon the covenants or undertakings of the defendants, in their said agreement contained, enter upon the work of enlarging their said canal, or prosecute the same; and in its allegation that one-half of the increased capacity of the said canal was not, by the terms of the said contract, subject to be used by the defendants, for that the said allegations tender issue upon matters of legal inference and not upon matters of fact.

Demurrer to amended seventh plea.

And the said plaintiffs, as to the said plea of the said defendants by them seventhly above pleaded, say, that the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendants, and that they, the said plaintiffs, are not bound by law to answer the same. And this they, the said plaintiffs, are ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment, and their damages by them sustained, on occasion of the said breach of covenant in the said declaration mentioned to be adjudged to them, &c.

And the said plaintiffs, according to the form of the statute in such case made and provided, state and show to the court here, the
69 following causes of demurrer to the said seventh plea, that is to say:

1. That the said defendants have concluded their said plea by putting themselves upon the country, &c., instead of by a verification.

2. That the said defendants have not, in and by their said plea, confessed and avoided, or traversed and denied that the defendants did, during the respective seasons of navigation of the years 1863 and 1864, divert from entering the canal of the plaintiffs', to be transported thereon, the coal in that behalf in the declaration mentioned, as in the declaration alleged.

3. That the allegation in the said seventh plea, that the defendants did transport and cause to be transported upon the said canal, all coal contained in boats owned or used by them, for the purpose of transporting coal entering the said canal, &c., and all coal belonging to them, or transported by them, or on their account, or in which, or in the transportation of which, they were in any way interested, which entered the said canal by railroad, &c., and paid to the plaintiffs all the toll chargeable thereon, &c., is an evasion, and not a traverse of the breach alleged in the declaration that the defendants did divert from entering the said canal, to be transported thereupon, the coal in the declaration mentioned.

Demurrer to amended eighth plea.

And the said plaintiffs, as to the said plea of the said defendants by them eighthly above pleaded, say that the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendants, and that they, the said plaintiffs, are not bound by law to answer the same; and this they, the said plaintiffs, are ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment, and their damages by them sustained, on occasion of the

said breach of covenant in the said declaration mentioned, to be adjudged to them, &c.

70 And the said plaintiffs, according to the form of the statute in such case made and provided, state and show to the court here the following causes of demurrer to the said eighth plea, that is to say:

1. That the said defendants have concluded their said plea by putting themselves upon the country, &c., instead of by a verification.

2. That the said defendants have not, in and by their said plea, confessed and avoided, or traversed and denied that the defendants did, during the respective seasons of navigation of the years 1863 and 1864, divert from entering the canal of the plaintiffs, to be transported thereon, the coal in that behalf in the declaration mentioned, as in the declaration alleged.

3. That the allegation in the said eighth plea, that the defendants did navigate upon and through the said canal of the plaintiffs all boats owned or used by the defendants for the purpose of transporting coal entering the said canal, &c., and paid to the plaintiffs all the tolls chargeable upon, or for the transportation of, all the coal contained in such boats, is an evasion, and not a traverse of the breach alleged in the declaration, that the defendants did divert from entering the said canal, to be transported thereupon, the coal in the declaration mentioned.

Demurrer to amended ninth plea.

And the said plaintiffs, as to the said plea of the said defendants by them ninthly above pleaded, say that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendants, and that they, the said plaintiffs, are not bound by law to answer the same; and this they, the said plaintiffs, are ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment, and their damages by them sustained on occasion of the said breach of covenant, in the said declaration mentioned, to be adjudged to them, &c.

71 And the said plaintiffs, according to the form of the statute in such case made and provided, state and show to the court here the following causes of demurrer to the said ninth plea, that is to say:

1. That the said defendants have not concluded their said plea by putting themselves upon the country.

2. That the said defendants have not, in and by their said plea, confessed and avoided, or traversed and denied that the defendants did, during the respective seasons of navigation of the years 1863 and 1864, divert from entering the canal of the plaintiffs to be transported thereon in that behalf in the declaration mentioned, as in the declaration alleged.

3. That the said defendants have not, in and by their said plea, stated or averred that it was by reason of the plaintiffs' having demanded or exacted, as a condition of said plaintiffs' suffering or permitting any boats laden with the coal for transportation upon the said canal, in said plea mentioned, to pass down the said canal, or through the locks thereof, the payment by the defendants to the said plaintiffs, as and for toll upon, and for the use of said canal in such transportation, a larger amount than the toll thereon stipulated and provided for, in and by the agreements in the declaration mentioned, and having refused to permit or allow any such boats so laden to pass down the said canal, or through the locks thereof, without the payment to them by the defendants of such alleged excessive toll upon the coal contained therein, that they, the said defendants, did, during the respective seasons of navigation of the years 1863 and 1864, divert from entering the said canal of plaintiffs, to be transported thereon, the coal in the said declaration in that behalf mentioned, as in the declaration alleged.

4. That the said defendants have not, in and by their said plea, stated or averred that they were ready or willing, but for the alleged demand or exaction of excessive tolls in the said plea mentioned, to transport over the said canal the coal in the said declaration in that behalf mentioned, which, during the respective seasons of navigation of the years 1863 and 1864, said defendants
72 diverted from entering the said canal, to be transported thereupon, as in the declaration alleged.

5. That the said defendants have not, in and by their said plea, stated or averred at what time or times during the seasons of navigation upon the said canal, in the years 1863 and 1864, the plaintiffs demanded or exacted the alleged excessive tolls in said plea mentioned, in respect of the coal which the defendants diverted from entering the said canal, to be transported thereon, as in the declaration mentioned, or refused to permit or allow any boats laden with such coal to pass down the said canal, or through the locks thereof, without the payment to them, by the defendants, of such excessive toll as in said plea mentioned, nor that until the plaintiffs so demanded and exacted such alleged excessive tolls, they, the said defendants, did not, during the respective seasons of navigation of the years 1863 and 1864, divert from entering the canal of the plaintiffs, to be transported thereon, the coal in the said declaration in that behalf mentioned, as in the declaration alleged.

(6.) That the said defendants have not, in and by their said plea, stated or averred that the excessive tolls which, in the said plea, are alleged to have been demanded and exacted, were ever demanded or exacted for the transportation, upon the said canal, of the coal in the said declaration mentioned, which the defendants, during the respective seasons of navigation of the years 1863 and 1864, diverted from entering the said canal of the plaintiffs, to be transported thereon, as in the declaration alleged.

(7.) That the special traverse in said plea, without this, that the said plaintiffs have been or were, at the several times in the declara-

tion mentioned, or any or either of them, ready and willing, &c., is too wide, in that it does not deny or tender an issue upon the readiness or willingness of the plaintiffs to furnish to any and all boats owned or used by the defendants, for the purpose of transporting coal, entering the said canal by railroad, connecting with the said canal at or near the mouth of the Wallenpaupack river, to wit, by
the railroad of the defendants in the said declaration men-
73 tioned, or containing coal entering as aforesaid, belonging to
or transported by or on account of the defendants, or containing coal entering as aforesaid, in which, or the transportation of which, the said defendants were or might be in any manner interested, or the transportation of which, under the provisions of the said agreement, the defendants might authorize or require all the facilities of navigation and transportation which the said canal ever afforded, when in good navigable condition and repair, to boats owned or used by any other company or person, or belonging to or used by, or containing coal transported by, for, or on account of the plaintiffs, to the extent of one-half of the whole capacity for transportation of the said enlarged canal, exclusive of the tonnage employed for the transportation of articles other than coal, in respect to the coal in the said declaration mentioned, which the defendants diverted from entering the said canal, to be transported thereon, as in the declaration alleged, or any part thereof, or otherwise confine the issue tendered to the question, whether the defendants had any justification or excuse for diverting such last-mentioned coal, or any part thereof, which is the matter in controversy in this action.

(8.) That the allegations in the said plea of the plaintiffs having demanded or exacted, as a condition of said plaintiff's suffering or permitting any boats laden with the coal for transportation upon the said canal, in said plea mentioned, to pass down the said canal, or through the locks thereof, the payment by the defendants to the plaintiffs as and for toll upon and for the use of said canal in such transportation, the much larger amount than the toll thereon stipulated and provided for in and by the agreements in the declaration mentioned, and of having refused to permit or allow any such boats so laden to pass down the said canal, or through the locks thereof, without the payment to them by the defendants of such alleged excessive toll upon the coal contained therein, do not sustain or justify the special traverse in said plea contained; without this, that the said plaintiffs have been or were, at the several times in the declaration mentioned, or any or either of them, ready and willing, &c.; the
74 exact accordance of the rate of toll charged upon such coal,
with the rate established and computed by the mode pointed out in the said agreements, not being a condition upon which depended the obligations of defendants to transport over the said canal all their coal, to the extent of one-half of the whole capacity for transportation of the said canal (exclusive of the tonnage employed in the transportation of articles other than coal,) which the said defendants might transport in each and every season over their said railroad,

connecting with the said canal as aforesaid, as in the declaration alleged.

(9.) That the said plea is evasive, uncertain, and insufficient; in this, that it neither alleges a default of the plaintiffs in permitting or allowing to be transported on their canal, as in and by their agreement in that behalf provided, the coal in the said declaration mentioned and alleged to have been diverted as aforesaid, nor does it allege or show that the said defendants ever refused or omitted to pay the excessive toll in the said plea mentioned, or in anywise objected to the demand and exaction in the said plea mentioned, or at any time or in any manner elected to treat the agreement, in the said declaration mentioned, as no longer binding upon the said defendants.

(10.) That the said plea is evasive, uncertain, and insufficient; in this, that it does not in any manner or way allege or show that at the time when the said coal, in the said declaration mentioned, was diverted, as therein alleged, the said agreement, in the said declaration mentioned, was not in full force and effect, and binding both upon the said defendants and the said plaintiffs, in respect of the said last-mentioned coal.

(11.) That the said plea is double, informal, and insufficient; in this, that in the inducement thereof it tenders an issue on the allegation that the plaintiffs demanded and exacted excessive toll, as a full defence to the action of the [the] said plaintiffs in this behalf; and then, as another and distinct defence to the said action, tenders an issue in respect of the coal alleged to have been diverted as aforesaid, on the general readiness and willingness of the plaintiffs, in the said declaration alleged, to perform the said agreement, in the said declaration mentioned, in the things therein mentioned, on the part and behalf of the said plaintiffs to be performed.

Demurrer to amended tenth plea.

And the said plaintiffs, as to the said plea of the said defendants by them tenthly above pleaded, say that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendants, and that they, the said plaintiffs, are not bound by law to answer the same; and this they, the said plaintiffs, are ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment, and their damages by them sustained on occasion of the said breach of covenant, in the said declaration mentioned, to be adjudged to them, &c.

And the said plaintiffs, according to the form of the statute in such case made and provided, state and show to the court here the same eleven several causes of demurrer to the said amended tenth plea, as are above specified as causes of demurrer to the amended ninth plea.

Demurrer to amended eleventh plea.

And the said plaintiffs, as to the said plea of the said defendants by them eleventhly above pleaded, say that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendants, and that they, the said plaintiffs, are not bound by law to answer the same; and this they, the said plaintiffs, are ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment, and their damages by them sustained on occasion of
76 the said breach of covenant, in the said declaration mentioned, to be adjudged to them, &c.

And the said plaintiffs, according to the form of the statute in such case made and provided, state and show to the court here the same eleven several causes of demurrer to the said amended eleventh plea, as are above specified as causes of demurrer to the amended ninth plea.

Demurrer to amended twelfth plea.

And the said plaintiffs, as to the said plea of the said defendants by them twelfthly above pleaded, say that the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendants, and that they, the said plaintiffs, are not bound by law to answer the same; and this they, the said plaintiffs, are ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment, and their damages by them sustained on occasion of the said breach of covenant, in the said declaration mentioned, to be adjudged to them, &c.

And the said plaintiffs, according to the form of the statute in such case made and provided, state and show to the court here the same eleven several causes of demurrer to the said amended twelfth plea, as are above specified as causes of demurrer to the amended ninth plea.

Demurrer to amended thirteenth plea.

And the said plaintiffs, as to the said plea of the said defendants by them thirteenthly above pleaded, say that the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against the said defendants, and that they, the said plaintiffs, are not bound by law to answer the same; and this they, the said plaintiffs, are ready to verify. Wherefore, by reason of the insufficiency

77 of the said plea in this behalf, the said plaintiffs pray judgment, and their damages sustained by them on occasion of the said breach of covenant, in the said declaration mentioned, to be adjudged to them, &c.

And the said plaintiffs, according to the form of the statute in such case made and provided, state and show to the court here the same eleven several causes of demurrer to the said amended thirteenth plea, as are above specified, as causes of demurrer to the amended ninth plea.

I, Stephen P. Nash, a counsellor of this court, do hereby certify that, in my opinion, the foregoing demurrers are well founded.

New York, June 12, 1866.

S. P. NASH.

Joinders in demurrer.

And the said defendants say that the said plea, by them secondly above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiffs from having and maintaining their aforesaid action thereof against the said defendants, and the said defendants are ready to verify and prove the same, when, where, and in such manner as the said court here shall direct and award: wherefore, inasmuch as the said plaintiffs have not answered the said plea, nor hitherto in any manner denied the same, the said defendants pray judgment, and that the said plaintiffs may be barred from having or maintaining their aforesaid action thereof against them, &c.

And the said defendents say that the said amended plea, by them seventhly above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiffs from having and maintaining their aforesaid action thereof against the said defendants, and the said defendents are ready to verify and prove the same, when, where and in such manner as the said court here shall direct and award, wherefore, inasmuch as the said plaintiffs have not answered the said plea, nor hitherto in any manner denied the
78 same, the said defendants pray judgment, and that the said plaintiffs may be barred from having or maintaining their aforesaid action thereof against them, &c.

And the said defendants say that the said amended plea, by them eightly above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiffs from having and maintaining their aforesaid action against the said defendants, and the said defendants are ready to verify and prove the same, when, where and in such manner as the said court here shall direct and award; wherefore, inasmuch as the said plaintiffs have not answered the said plea, nor hitherto in any manner denied the same, the said defendants pray judgment, and that the said plaintiffs may be barred from having or maintaining their aforesaid action thereof against them, &c.

And the said defendants say that the said amended plea, by them

ninthly above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiffs from having and maintaining their aforesaid action thereof against the said defendants, and the said defendants are ready to verify and prove the same, when, where and in such manner as the said court here shall direct and award; wherefore, inasmuch as the said plaintiffs have not answered the said plea, nor hitherto in any manner denied the same, the said defendants pray judgment, and that the said plaintiffs may be barred from having or maintaining their aforesaid action thereof against them, &c.

And the said defendants say that the said amended plea, by them tenthly above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiffs from having and maintaining their aforesaid action thereof against the said defendants, and the said defendants are ready to verify and prove the same, when,
79 where and in such manner as the said court here shall direct and award; wherefore, inasmuch as the said plaintiffs have not answered the said plea, nor hitherto in any manner denied the same, the said defendants pray judgment, and that the said plaintiffs may be barred from having or maintaining their aforesaid action thereof against them, &c.

And the said defendants say that the said amended plea, by them eleventhly above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiffs from having and maintaining their aforesaid action thereof against the said defendants, and the said defendants are ready to verify and prove the same, when, where and in such manner as the said court here shall direct and award; wherefore, inasmuch as the said plaintiffs have not answered the said plea, nor hitherto in any manner denied the same, the said defendants pray judgment, and that the said plaintiffs may be barred from having or maintaining their aforesaid action thereof against them, &c.

And the said defendants say that the said amended plea, by them twelfthly above pleaded, and the matters therein contained in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiffs from having and maintaining their aforesaid action thereof against the said defendants, and the said defendants are ready to verify and prove the same, when, where, and in such manner as the said court here shall direct and award; wherefore, inasmuch as the said plaintiffs have not answered the said plea, nor hitherto in any manner denied the same, the said defendants pray judgment, and that the said plaintiffs may be barred from having or maintaining their aforesaid action thereof against them, &c.

And the said defendants say that the said amended plea, by them thirteenthly above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth,
80 are sufficient in law to bar and preclude the said plaintiffs from having and maintaining their aforesaid action thereof against

the said defendants, and the said defendants are ready to verify and prove the same, when, where, and in such manner as the said court here shall direct and award; wherefore, inasmuch as the said plaintiffs have not answered the said plea, nor hitherto in any manner denied the same, the said defendants pray judgment, and that the said plaintiffs may be barred from having or maintaining their aforesaid action thereof against them, &c.

But because the said court, before the judges thereof now here, are not yet advised what payment to give of and upon the premises, a day is therefore given the parties aforesaid, that they, before the judges of the said Circuit Court of the United States, at a term of said court to be held in and for the southern district of New York, at the United States court-rooms in the city of New York, on the third Monday of October, in the year of our Lord 1866, to hear the judgment of the said court of and upon the premises, because the said court now here are not yet advised thereof, &c.

At which day and place last aforesaid, before the judges of the said Circuit Court of the United States in and for the said southern dist. of New York, at the United States court-rooms in the city of New York, in said southern district, came the parties aforesaid, by their attorneys aforesaid; but because the said court, before the judges thereof now here, are not yet advised what judgment to give of and upon the premises, a day is therefore given the parties aforesaid, that they be before the judges of the said Circuit Court of the United States at a term of said court to be held in and for the
81 southern dist. of New York, at the United States court-rooms, in the city of New York, on the first Monday of April, in the year of our Lord 1867, to hear the judgment of the said court of and upon the premises, because the said court now here is not yet advised thereof, &c.

At which day and place last aforesaid, before the judges of the said Circuit Court of the United States in and for the southern district of New York, at the United States court-rooms, in the city of New York, in said southern district, came the parties aforesaid, by their attorneys aforesaid. Whereupon all and singular the premises being seen and by the said court, before the judges thereof now here, fully understood, and mature deliberation being thereupon had, it appears to the said court here that the said declaration of the said plaintiffs, and the matters therein contained, in manner and form as the same are therein pleaded and set forth, are not sufficient in law for the said plaintiffs to have or maintain their aforesaid action thereof against the said defendants; and likewise that the said second plea and the said amended seventh, eighth, ninth, tenth, eleventh, twelfth, and thirteenth pleas above pleaded by the said defendants, The Pennsylvania Coal Company, in manner and form aforesaid, and the matters therein contained are respectively sufficient in law to bar the said plaintiffs, the President, Managers, and Company
82 of the Delaware and Hudson Canal Company, from having or maintaining their said action against the said defendants, The Pennsylvania Coal Company.

Therefore it is considered that the said plaintiffs, the President, Managers, and Company of the Delaware and Hudson Canal Company, take nothing by their said bill, but that they be in mercy, &c.; and that the said defendants, The Pennsylvania Coal Company, do go thereof, without day, &c. And it is further considered that the said defendants, The Pennsylvania Coal Company, recover against the said plaintiffs, the President, Managers, and Company of the Delaware and Hudson Canal Company, their costs and charges by them about the defence in this behalf expended, amounting to the sum of fifty-eight 50-100 dollars, by the court here adjudged to the said defendants, with their assent; and that the said defendants have execution therefor against the said plaintiffs.

Judgment signed this 2d day of November, eighteen hundred and sixty-seven.

R. E. STILWELL, *Dep'y Clerk.*

Endorsed: U. S. Circ't Court, south. dist. of N. Y. The Pennsylvania Coal Co. *ag's* The President, Managers, and Co. of the Delaware and Hudson Canal Co. "Judgm't record." Evarts, Southmayd & Choate, att'ys. Filed Nov. 2, 1867.

83 Supreme Court of the United States.

THE PRESIDENT, MANAGERS, AND COMPANY of the Delaware and Hudson Canal Company
v.
THE PENNSYLVANIA COAL COMPANY.

Know all men by these presents that we, Isaac N. Seymour, of the city of New York, and J. C. Hartt, of the State of New Jersey, are held and firmly bound unto the Pennsylvania Coal Company in the sum of one thousand dollars, to be paid to the said The Pennsylvania Coal Company, or their assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents; sealed with our seals, and dated this 13th day of November, A. D. 1867.

84 Whereas the above-named the President and Company of the Delaware and Hudson Canal Company hath presented a writ of error in the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the Circuit Court of the United States for the southern dist. of New York: Now, therefore, the condition of this obligation is such, that if the above-named the President, Managers, and Company of the Delaware and Hudson Canal Company shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation to be void, otherwise the same shall be and remain in full force and virtue.

ISAAC N. SEYMOUR.
J. C. HARTT.

Sealed and delivered in presence of—
[L. S.] J. H. K. BLAUVELT.

SOUTHERN DIST. OF NEW YORK, *ss:*

Isaac N. Seymour and J. C. Hartt, being duly sworn, say,
85 and each for himself says that he is one of the subscribers to the foregoing bond; that he does business within the southern district of New York, and is worth the sum of two thousand dollars over and above all his debts and liabilities, exclusive of property exempt by law from execution.

J. C. HARTT.

Sworn to before me this 13th day of Nov., 1867.
[L. S.] J. H. K. BLAUVELT,
Notary Public in and for the City and County of N. Y.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

On this 13 day of Nov'r, 1867, before me personally came Isaac N. Seymour and J. C. Hartt, known to me to be the same persons described in and who executed the foregoing bond, and acknowledged to me that they executed the same for the uses and purposes therein mentioned.

[L. S.] J. H. K. BLAUVELT,
Notary Public in and for the City and County of New York.

86 Endorsed: Supreme Court of the United States. The President, Managers, and Co. of the Delaware and Hudson Canal Company, pl'ffs in error, *vs.* The Pennsylvania Coal Co. Bond on writ of error. Owen, Nash & Gray, att'ys for pl'ffs in error.

We approve of the form and sufficiency of the within bond.
EVARTS, SOUTHMAYD & CHOATE,
Att'ys for Def'ts in Error.

The within bond approved Nov. 14, 1867.
SAM'L BLATCHFORD, *Dist. Judge.*

Filed Nov. 14, '67.

87 United States of America, to the Pennsylvania Coal Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of Dec'r next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the southern district of New York, wherein the President, Managers, and Company of the Delaware and Hudson Canal Company are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Blatchford, one of the justices of the Circuit Court for the southern district of New York, this 14 day of November, in the year of our Lord 1867.

SAM'L BLATCHFORD.

88 Endorsed: Supreme Court of the United States. The President, Managers, &c., of the Delaware and Hudson Canal Co., pl'ffs in error, *v.* The Pennsylvania Coal Co., def't in error. Citation. Owen, Nash & Gray, att'ys for pl'ffs in error.

Due service of a copy of within citation is admitted.
Dated N. Y., Nov. 15, 1867.

EVARTS, SOUTHMAYD & CHOATE,
Att'ys for Def'ts in Error.

Filed Nov. 14, 1867.
REC. 170—5

Evening Post Steam Presses, 41 Nassau St., N. Y.

Supreme Court

OF THE UNITED STATES.

The President, Managers, &c., of the Delaware & Hudson Canal Company, Plaintiffs in Error, *vs.* The Pennsylvania Coal Company, Defendants in Error.	Brief of Plaintiffs in Error.

This is a writ of error brought by the plaintiffs below to review a judgment of the Circuit Court in the Southern District of New York, in favor of the defendants below.

The action was covenant; the defendants pleaded several special pleas to which the plaintiffs demurred. Upon the argument of the demurrers the defendants fell back upon the declaration as the first pleading, and the Court gave judgment in their favor on the ground of its insufficiency.

The question thus presented was of course the same as would have been raised by general demurrer to the declaration, the pleading over having waived any question of mere form; (*Aurora City* v. *West*, 7 *Wall.*, 82, 93); and the point decided was in fact that the declaration showed no cause of action.

The cause of action presented by the declaration involved the true construction of a long and complicated agreement made originally between the plaintiffs and the Wyoming Coal Association, and subsequently between the plaintiffs and the Pennsylvania Coal Company, the defendants, they having taken the place of the said Association.

The agreement between the plaintiffs and the Wyoming Coal Association is set out *verbatim* in the declaration (*fols.* 13–23,) as well as the subsequent agreement with the defendants, (*fols.* 11, 12.)

To aid in the understanding of the agreements, the declaration alleged the circumstances under which they were made, and these of course are to be taken as admitted.

The agreements provided for a permanent and reduced rate of tolls to be charged by the plaintiffs as owners of the Delaware & Hudson Canal upon boats of the Wyoming Coal Association, and subsequently of the defendants, as owners of coal mines, and the particular claim of the plaintiffs' is, that according to the true construction of the agreements, there was imposed upon the defendants, in consideration of the obligation of plaintiffs, a correlative obligation to send their coal to market by plaintiffs' canal.

It is conceded by plaintiffs that there is no explicit covenant by the defendants to transport a pound of coal by the canal, but they contend that their obligation in this respect is so plainly assumed by the contract that the Courts will enforce it as an implied covenant as fully as though it were expressed in words.

I. The rule is settled that though a contract may in terms bind but one party, yet the law will imply corresponding and correlative obligations when that is necessary to carry out the intention of the parties and prevent the contract from being ineffectual. Thus, "if a man "engages to work and render services which necessitate "great outlay of money, time and trouble, and he is only "to be paid by the measure of the work he has per-

"formed, the contract necessarily pre-supposes and im-
"plies on the part of the person who engages him an
"obligation to supply the work; so when there is an
"engagement to manufacture some article, a correspond-
"ing obligation on the other party is implied to take it,
"for otherwise it would be impossible the party bestow-
"ing his services could claim any remuneration," *Per* COCKBURN, *C. J.*, in *Churchward* vs. *The Queen*, *L. R.* 1, *Q. B.* 173, 198; *Barton* vs. *McLean*, 5 *Hill R.*, 256.

The cases in England are numerous in which this question has arisen. The follwing are some of them in which covenants not expressed have been implied by the Courts. *Bealey* vs. *Stuart*, 7 *Hurlst & N.* 753; *McIntyre* vs. *Belcher*, 14 *Com. B. N. S.* (108 *E. C. L.*) 654; *Whittle* vs. *Frankland*, 2 *B. & S.* 49 (110 *E. C. L.*); *Pilkington* vs. *Scott*, 15 *M. & W.* 657; *Rigby* v. *Great W. R. W. Co.*, 14 *M. & W.* 811; *Wood* vs. *Copper Miners Co.*, 7 *Q. B.* (62 *E. C. L.*) 906; *The Great N. R. Co.* v. *Harrison*, 12 *Com. B.* (74 *E. C. L.*) 576; *Elderton* vs *Emmons*, 4 *Com. B.* (56 *E. C. L.*) 479; 6 *Com. B.* (60 *E. C. L.*) 160; 13 *Com. B.* (76 *E. C. L.*) 495, *and* 4 *H. Lord's Cases*, 624.

In *Aspdin* vs. *Austin*, 5 *Q. B.* (48 *E. C. L.*) 671; *Rashleigh* vs. *Railway Co.*, 10 *C. B.* (70 *E. C. L.*) 612 *and Churchward* vs. *The Queen*, *Law Rep.* 1 *Q. B.* 173, the Courts refused to imply a covenant.

The most important of these last cases are *Aspden* vs. *Austin* and *Churchward* v. *The Queen*. Both of these admit unequivocally the doctrine contended for by plaintiffs, though they held that in the contracts before the Court, the express covenants of the parties precluded the right to imply any other.

In *Aspdin* v. *Austen*, the plaintiffs agreed to manufacture for defendant, and defendant promised to pay him £4 weekly for two years, and £5 weekly for the

third year, and then receive him into partnership. The action was brought on the ground that defendant had refused employment to plaintiff, and on the theory that the contract imported an obligation to employ for three years. It was not brought for the wages, which it was conceded the plaintiff was entitled to, nor for the not taking into partnership. This was not to be done till the end of three years (September, 1844) and the action was commenced before that period. (The demurrers were argued in January, 1844. *p.* 677). The Court admitted that the cases established that "where words "of recital or reference manifested a clear intention that "parties should do certain acts, the Courts have from "these inferred a covenant to do such acts and sustained "actions of covenant for the non-performance, as if the "instruments had contained express covenants to per- "form them." But added, "it is a manifest extension of "that principle to hold that where parties have expressly "covenanted to perform certain acts they must be held "to have impliedly covenanted for every act covenient "or even necessary for the perfect performance of their "express covenants." The express covenant was as to pay wages for three years. This the Court held the defendant liable to perform. But as to the further claim, said, "The breach assigned by the plaintiff assumes that "the defendant, at however great cost to himself, was "bound to continue his business for three years; but "the defendant has not covenanted to do so; he has "covenanted only to pay weekly sums for three years to "the plaintiff on condition of his performing what, on his "part, he has made a condition precedent; *and the "plaintiff will be entitled to recover these sums, whether "he performs that or not*, so long as he is ready and "willing and offers to perform it, and is prevented only "by the defendant from doing it."

"This, then, is the safe rule for determining the rights "of these parties as between each other, and no injus- "tice follows to the plaintiff. If he should assign a

" breach in the non-payment of the weekly sums, it " would be no answer for the defendant to say he had " discontinued the business and dismissed the plaintiff; " the reply would be that he might, if he pleased, do " both, but that he was still bound to make the payment " which he had expressly covenanted to make."

It is clear, therefore, that the Court considered the declaration as seeking to imply a covenant to continue the employment for three years, as a " convenient" covenant towards the performance of the ultimate obligation to take the plaintiff into partnership, and ruled against this view on the ground that damages for a breach of the covenants which were expressed, would give full indemnity.

The distinction between the case just cited and the case at bar will appear from the language of the Court in *Churchward* vs. *The Queen.*

In this case, the covenant was to pay £18,000 annual subsidy to the plaintiff, who engaged to keep certain vessels in readiness for the mail service of the government. He expected from the contract certain important incidental advantages, and his action was brought as upon an implied covenant by the government to employ his vessels, so that he might reap the full benefit he had anticipated. But it was said by the Court, after stating its construction of the contract, " the argument as to the " necessity of implying this covenant, on the ground " that otherwise Mr. Churchward would never be in a " position to obtain the remuneration, which is condi- " tioned upon the performance of the services contract- " ed for by him, fails. If, indeed, the contract had been " to pay, not in the shape of an annual subsidy, *but ac- " cording to the number of mails conveyed*, then we might " have been at liberty, and perhaps bound, to imply the " covenant which is contended for on the part of the " suppliant, because, in that case, he might have had his " vessels in readiness and have incurred all the attend-

" ant expenses; and although at all times ready and " willing to fullfil his part of the contract, yet inasmuch " as his remuneration was to depend, not on his being " constantly ready and willing, but on the fact of mails " being conveyed in his vessels, it would be but reason- " able to infer a covenant to employ him " (*p.* 197.)

In the case at bar, the plaintiffs contend that as their remuneration for the obligations imposed upon them by the contract was to depend, not on being ready and willing, but on the fact of coal being in fact transported on which tolls would become chargeable, neither this case, nor *Aspdin* vs. *Austin*, are in reality adverse to their claim. The principles of construction conceded in both cases are those on which plaintiffs rely.

Among the cases above cited in which the Courts have implied covenants not expressed are many quite analagous to the one at bar. See also the American cases of *Barton* vs. *McLean*, 5 *Hill*, 254; *Richards* vs. *Edick*, 17 *Barb.*, 260.

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II.—But, as was said in *Bealey* vs *Stuart*, " the question is, what is the construction which the Court are bound to put upon the language which the parties have used—it does not throw a great deal of light on any case to bring forward what the Court has decided under other circumstances and when different language was used."

To recur then to the agreement itself: The Delaware and Hudson Canal Company, the plaintiffs, covenanted and agreed with the Wyoming Coal Asociation to furnish, *at all times thereafter* (*fol.* 15) to the boats of said Association, as specified, all the facilities of navigation afforded by the canal to boats used by others, or by the plaintiffs, charging and collecting a toll per ton, to be established each year, in a particular manner regulated

by the market value of coal:. Provided, however, (*fol.* 17) that the plaintiffs should not be bound to allow the quantity transported in pursuance of the agreement to exceed, in any one season, 400,000 tons, unless the canal should be enlarged, and in that case, one-half its capacity of transportation.

The Wyoming Coal Association promised and agreed with the plaintiffs (*fol.* 22) to use all its influence to cause the speedy construction of a railroad from its coal land to the plaintiffs' canal, at or near the mouth of the Wallenpaupack river, and that if the construction of such road should not be commenced within one year, and finished within three, the plaintiffs might declare the agreement null and void.

This is the only explicit undertaking upon the part of the Wyoming Coal Association that need be noticed. It was not an incorporated association, and accordingly there are various stipulations for further assurances and not to take advantage, in case of suits, of questions of abatement, non joinder, and the like (*fols.* 18–22), but these portions of the contract may be left out of view.

The defendants claim that the contract was simply an agreement by the plaintiffs that they would, for all future time, furnish the facilities of transportation stipulated for, at the rates of toll named, provided or in case a railroad should be built, within three years, connecting the coal lands of the Association with plaintiffs' canal; and that when the road was thus built, it furnished the executed consideration for the obligation of plaintiffs, which became fixed and permanent for all time, whether any coal was sent by the canal or not.

It is undoubtedly true that the tariff of tolls proposed was one inducement to the building of the road, but it does not follow *e converso* that the building of the road was the consideration of plaintiffs' undertaking. This is the error into which, it is respectfully submitted, the Court below was led. The plaintiffs' undertaking was to furnish facilities of transportation, at so much per ton of coal, but compliance with this undertaking yielded no

remuneration unless the boats laden with coal came for transportation.

The toll was the compensation for the use of the canal; the special rate to the Wyoming Coal Association was in consideration of the magnitude of the employment which its coal would furnish for the unused capacity of the canal, and as an equivalent for the special rate the plaintiffs contend that there was, on the part of the Coal Association, an obligation to use the canal; but the inducement to building the railroad, which was merely a preliminary to the use of the canal, was the pledge to make the reduced rate a *permanent* one.

Keeping in mind the distinction which may exist between the inducement to entering into a contract and a consideration which supports the undertakings contained in it, reference will now be made to some of the recitals and other statements in the agreement itself, for aid in its construction.

The consideration clause, is as follows: "Now, therefore, in consideration of the premises, and of acts done and investments made, with a view to the transportation of coal on the canal of the said Delaware and Hudson Canal Company, as well as of the mutual undertakings herein contained, and of one dollar paid by the managers of the said Wyoming Coal Association," etc. (*Fol.* 14.)

The "premises" herein referred to, are the recitals by which the agreement is prefaced, and they are:

(1.) That the plaintiffs' own road, which brought coal to the canal, was not sufficient to employ the full capacity of the canal.

(2.) That if the canal should be enlarged, as it might be, its unemployed capacity would be still greater.

(3.) That it was for the interest of the plaintiffs, that in either event its surplus capacity should not remain

unemployed, but that it should be allowed to be used at a reasonable rate of toll by any other company which shall hold lands for the purpose of mining coal, and shall connect such lands by railroad or otherwise, with the said canal *for the purpose of transporting coal thereon*, which [lands] the plaintiffs could not so hold or connect.

The next three recitals refer to matters outside of the contract, and will be noticed separately. But these first three recitals show conclusively that the motive on the part of the Company was *to secure the employment of the surplus capacity of its canal*, and that it offered a reduced or "reasonable" rate of tolls to that end, the use of the canal at the reduced rate being offered not to all the world but to such a company as, holding lands for the purpose of mining coal, should connect such lands by railroad or otherwise with the canal *for the purpose of transporting coal thereon*, that is, on the canal.

(4.) The next recital (*fol.* 14) introduces another element, namely, the question whether the reduced or reasonable rate should be for a certain period or for all time. It bears specially on this point, proceeding thus: "Whereas, influenced by these considerations and aware that no company could prudently undertake to construct a railroad connecting with the canal without a certainty of being allowed to transport on the said canal at a *permanent* rate of tolls," the plaintiffs did by formal resolution on the 28th of April, 1847, for the purpose of creating motive and inducement to capitalists to invest their funds in the construction of a railroad to be connected with the canal, offer a *permanent* tariff of coals on all coal entering the said canal by any such railroad.

(5.) The next recital (*fol.* 14) states that the Wyoming Coal Association was formed with a view to mining coal, and causing the same to be transported by railroad connecting with the canal.

(6.) The last simply recites that negotiations have been pending for some time, and that propositions had finally been agreed upon.

The resolutions and propositions referred to in these recitals are set out in the second plea (*fols.* 28–32), and were treated by the Court below as in the Case to aid in the construction of the agreement. The propriety of this course might be questioned, but for the present they will be considered in this connection.

The plaintiffs contend that they add nothing whatever to the recitals. The questions mentioned in the report and resolutions of April 28th, 1847, referred to in the third recital, are as to the tariff or rate of toll (*fols.* 28–9), and as to the duration of such rate. The question of tariff or rate is immaterial here, but as to the other question, the language confirms the view above taken. "The Committee deem it inexpedient to fix any definite period for the continuance of the above rate of toll. Such a limitation would operate as a discouragement and hindrance to those who may be disposed to make a railroad communication with the canal, and perhaps prevent it entirely." (*fol.* 29.)

All that follows, so far as the question here involved is concerned, relates to the rate of toll, and the mode of getting at it in reference to the market price of coal.

III.—Upon the recitals of the contract, then, after incorporating all the matters referred to in them, the parties may be considered as led to the contract thus:

Delaware and Hudson Canal Company.—We have more canal capacity than we can use, and are likely to have more than we have now; if you will use it we will take your coal at a reduced rate, the rate to be a sliding scale, according to the market price of coal each year, but this shall not apply to more than half the capacity of the canal.

Wyoming Coal Association.—But we can't avail ourselves of your offer without building a road to connect our coal lands with your canal, and any way your proposed rate of toll needs some modification.

Delaware and Hudson Canal Company.—We'll talk further about the rate, but to induce you to build the road we'll agree that the rate which we shall fix upon shall be made permanent.

It is apparent, then, that the mutual stipulations were on the one part, to use the canal; on the other to allow it to be so used at a reduced rate. The inducement to build the road was the undertaking of the Company never to repudiate the arrangement.

IV.—So much for the recitals or the "premises"—referred to in the consideration clause, (*fol.* 14.)

To return to the clause itself: "In consideration of the premises, and of acts done and investments made with a view to the transportation of coal on the canal," &c. This is the language of both parties. It assumes that all that has been done before to bring about the arrangement then entered into, the acts so far done, and the investments so far made, have been *with a view to the transportation of coal on the canal;* not with a view specially to induce the building of the road, but rather that the building of the road, if that had been in fact commenced, was with a view to the transportation of coal on the canal.

But the clause goes on, "as well as of the *mutual* undertakings herein contained,"—what mutual undertakings? The undertakings on the part of the plaintiffs were plain enough; but the undertakings of the Wyoming Coal Association, were simply not to plead in abatement, &c., and cannot be the "mutual undertakings" referred to. These were stipulations, which of course did not affect the consideration. The contract must needs be valid without these stipulations, or an action could

never be sustained in which a Court would have to consider whether to strike out a plea in abatement or not. All then that is left is the clause about building the road, (*fol.* 22.)

"And in consideration of the mutual undertakings herein contained, the said Wyoming Coal Association does hereby promise and agree," [not to build a road, but] that it will "use all its influence to cause the speedy construction of a road," by whom? Clearly this undertaking cannot be considered as the consideration which supports all the undertakings of the plaintiffs.

This undertaking alone would make the contract read thus: If the Wyoming Coal Association will use its influence to have a road built connecting with the canal, and such road shall be built within three years, the Canal Company pledges itself to the Association, to transport all its coal coming over said road in all future time at a reduced rate of toll.

It may be possible that such a contract would not be void, as being utterly destitute of consideration; but it seems quite clear from the reading of the whole contract, that this undertaking is not the true consideration for the undertaking of the plaintiffs.

If not, if the contract requires balancing, as it were, the considerations arrange themselves thus: reduced rate of tolls, as against the agreement to transport a large amount of coal. Permanent reduction as an inducement to enter into the arrangement and to build the road, without which, as a pre-requisite, the contract could not go into effect at all.

V.—That there was in this contract something more undertaken by the Wyoming Coal Association than merely not to plead in abatement, and to try to have the road built, is confirmed by reference to the contract sub-

sequently made with the defendants themselves, (*fols.* 11, 12.)

In this contract, the defendants style themselves "a corporation created by the Legislature of the State of Pennsylvania." All the stipulations, therefore, in the original contract which owed their existence to the non-corporate character of the Wyoming Coal Association had become extinct.

The contract, too, recites that the railroad has been constructed. The undertaking to try to have it built was, therefore, performed.

Nevertheless, the defendant formally covenanted as follows: "And the said Pennsylvania Coal Company does hereby covenant and agree to and with the said Canal Company that it will keep and perform with said Canal Company all the covenants and stipulations in the said annexed agreement mentioned, to be kept or performed by the said Wyoming Coal Association." That is to say, it will use its influence to cause the construction of a road already built, and, though a body corporate, will not, in suits against it, take advantage of any non-joinder, &c., of any of the stockholders. This is absurd; and yet there is nothing else in the covenants or stipulations of the Wyoming Coal Association which the defendants herein undertook to keep and perform, *unless there was implied by law* the agreement to send forward by the canal the coal which the Canal Company had agreed to allow to be transported upon the terms named in the contract.

It is true that it is, in this later agreement, provided that it should not vary or alter the effect or give construction to the provisions of the original, but assuming, as it did, that there was something in the original agreement which still remained as an obligation due to the plaintiffs, notwithstanding the road had been built, and the Wyoming Coal Association succeeded by a body corporate, we are justified in looking into the original contract, not to vary or alter the effect of it, but to dis-

cover what it was in it, either expressed or implied, which still remained as such an obligation, the obligation that the Pennsylvania Coal Company covenanted to keep and perform.

VI.—It will be objected that no undertaking by the defendants to transport coal by the canal can be implied, because it is impossible by means of the agreement to define with accuracy the extent of the obligation. But the plaintiffs claim that the obligation can be so defined as to be enforced equitably and according to the true spirit of the agreement, and this is all that is necessary.

(1.) Plaintiffs concede that the agreement imposes no obligation to continue the mining of coal in order to furnish employment to the canal. The subject matter of the contract was the transportation, not the mining of coal. Whether the defendants should mine coal or not might be safely left to the general considerations of interest which would affect similarly all miners, including plaintiffs themselves.

A similar objection existed in the case of *Barton* v. *McLean*, 5 *Hill*, 256. *McLean*, who owned a forge connected with a dam and water privileges, and used the forge for smelting ore, leased to *Barton* the privilege of cleansing ore with water from the dam, *Barton* agreeing "to erect machinery for cleansing ore at the aforesaid place, and to furnish what ore may *be wanted in stocking said forge at a price* not to exceed $5 per gross ton of cleansed or washed ore." There was no agreement by *McLean* to accept and pay for the ore contemplated, but upon an averment that he in fact ran his forge and did use large quantities of ore, the Court held him bound to take from *Barton* the ore contemplated by the contract. His supplying himself with ore elsewhere was an evasion of his obligation, and could not be ex-

cused by taking the ground that he might have stopped his forge entirely.

(2.) Plaintiffs further concede that the agreement did not oblige the Association to see that coal came over their said road. As the Canal Company was not obliged to transport all the coal which the defendants might mine, but only such as came over the road to the canal, so they do not claim that the Association was bound to send by the canal any other coal than that which came to the canal by the railroad, and of this not more than the canal was bound to carry at the reduced rates.

(3) What coal it was that the plaintiffs were bound to transport at the reduced rates is described in a remarkable classification, and the defendants have made much of this as obscuring the obligation sought to be implied. But it will be found that *all* coal coming over the railroad to the canal, or in the language of the agreement "entering the said canal," by the railroad (*fol.* 15), was entitled to transportation at the rates prescribed, if the Association had any interest in it as owners or carriers to the junction, or owners or hirers of the boats in which it was to go forward.

The right of the defendants, however it originated, to arrange for the transit of the coal, gave them the right to forward it under the contract. All coal, therefore, to an amonnt not exceeding one-half the capacity of the canal, (for beyond this amount neither party was bound,) which, unless diverted by the act of the defendants themselves at the point of entering the canal, would have entered it, and given plaintiffs tolls upon it, was coal which defendants were bound to send by it. In other words, the difficulty of construing the contract is no other than would exist if at the end of the first paragraph at page 9, the words were added: "And the said association agrees to forward the coal above described by said canal."

(4.) Ingenuity may always suggest difficulties in defining the obligation which a vague contract imposes, but this will not divert the Court from pronouncing against a clear breach.

Thus, in *McIntyre* v. *Belcher*, 14 *Com. B., N. S.*, (108 *E. C. Law*), 654, where, in an agreement for the sale of the goodwill of a medical practice, the drugs, surgical instruments &c., were sold at a price, and the vendor agreed not to practice for ten years within certain limits, and the purchaser agreed to pay for four successive years, if he should be living, one-fourth of all his receipts, provided they should amount to a certain sum; it was held that a covenant was implied to carry on the practice. It was objected that the defendant could not be bound to carry on at a loss, that he might be disabled by injury, &c., but the answer of the Court was, "the breach assigned is that the defendant having been let into possession, has by his own acts and default wholly disabled and incapacitated himself from further carrying on the business . . . that is, that he has wilfully chosen to destroy the goodwill." (*P.* 664.)

In the case at bar, the breach assigned is that the defendants intending to evade their covenant, induced the N. Y. & Erie R. R. Company to build a branch road connecting with that of the defendants *at the point where this connects with the canal* of plaintiffs, and diverted from entering the canal, and caused to be transported on the said Erie Railroad, coal which defendants had brought over their road *to the point of junction with the canal*, and which but for such diversion, would have gone by the canal and yielded tolls to the plaintiffs under the contract. (*fol.* 26)

If this be true, as it must be taken to be, there is no need of considering whether or not other acts not charged would be a breach of the implied obligation of the defendants, nor what would be the effect of sending the coal part way, or almost, to the junction and then switching it off upon a branch track.

VII.—In interpreting contracts which seem not fully to express the obligations on both sides, the question is not simply what either party intended, but rather what each party supposed the other party understood by the contract; in other words, the interpretation is to be according to the equity and fair meaning of the whole arrangement, if this does not conflict with the positive provisions of the agreement. (See Paley, as cited in *Chitty on Cont.*, 74; *Potter* vs. *Ont & Liv Ins. Co.*, 5 *Hill*, 147.)

In this view the following considerations are worth noticing:

1. The plaintiffs' canal was primarily for the transportation of coal. It ran into the coal region and was connected with the coal mines by railroads. There was little miscellaneous freight. The building of defendants road therefore tended to the benefit of plaintiffs, not by bringing a general traffic to the canal, but simply by making a new connection with the coal fields. (*fol.* 8, 10, 13, 14.) The mere building of the railroad, therefore, except as it might *secure* the use of the canal by the coal that came over the road, was no inducement to plaintiffs to subject themselves to the onerous obligations imposed by the contract.

2. The contract substantially requires of plaintiffs to reserve for the use of defendants one-half of the capacity of the canal, and this obligation prevents the plaintiffs from multiplying their own connections with the coal fields or inviting others to invest in such enterprises, because the defendants may at any time, though they substantially cease to use the canal, resume its use and claim all their contract rights.

This has been, in the argument in this case, but only here, denied by the defendants. Their suggestion in this case, is that the canal being a public highway is open to all, and that they have no rights except in common with the general public, their rights under the contract being simply to a lower rate of toll than others.

The agreement, however, is to furnish to defendants' boats containing coal, &c., at the reduced rate of tolls, "all the facilities of navigation and transportation, which the canal shall afford to boats owned or used by any other Company or persons, or belonging to or used by, or containing coal transported by, for, or on account of" the plaintiffs, (*fol.* 15.)

The plaintiffs being not only owners of the canal, but also of coal mines, must of course make their mining arrangements in reference to the capacity of the canal to transport coal. Suppose that besides their own road referred to at *fol.* 13, as being insufficient to bring as much coal as the canal could carry, they should build, or induce some other Company to build another, the two together being sufficient fully to employ the canal: Could the plaintiffs refuse to take defendants' coal under the contract, because the canal was fully employed, or would the defendants be content with their chance, first come first served? In 1851, when in full use of the canal, they brought a suit against the Canal Co., to enforce this undertaking as to facilities of navigation. (31 *N. Y. Rep.*, 91.) In that case, no question came up as to the capacity of the canal, but if they could show in such a case, that the obstructions of navigation were owing to the Canal Co's own acts in filling it up in prejudice of this contract, it would be difficult to answer the charge.

Yet they insist on keeping this obligation over the plaintiffs, to the discouragement of enterprise that might employ the full capacity of the canal, while they claim the option of using it themselves or not. This must be conceded to be unconscionable and oppressive.

(3.) Defendants complain that plaintiffs' interpretation of the contract is in restraint of trade, of the freedom of selection of rival public highways.

This might be true if the defendants left the Canal Company as free as they claim to be themselves. But the grievance of the plaintiffs is that the defendants hold over them *in terrorem* the obligations of this contract, while they claim to be free from it.

(4.) The construction claimed by plaintiffs imposes no hardship on the defendants. They have only to relieve the Canal Company from the contract to be relieved themselves. It is the connection of their railroad with the canal that fastens the obligations of the contract on the plaintiffs.

If the defendants have found a route to market more available than the canal, let them sever this connection and the contract falls or, which is the same thing, let them notify the plaintiffs that they shall abandon the contract, and claim no further benefits under it. They complain that at the market price of coal, the toll becomes a high one, as no increase is made in the assumed cost of production. But the expense of keeping up the canal is in like manner increased to the plaintiffs. The answer to the whole complaint of hardship is, that it is the defendants who insist on holding the plaintiffs bound. And the injustice is in holding them tied up from making any engagements for the use of the canal, which may interfere with the shifting purposes of the defendants, and even requiring them, in order to collect any toll at all, as the boats may pass, to go through every spring with the formality of ascertaining under the contract the rate of tolls on coal which the defendants will send by the canal, if the rate suits them, if not, will send by the Erie Road.

(5.) The injustice in this case of the defendants' position is apparent. The canal is a public work. The charter was granted for a public benefit—the increased supply of coal. Plaintiffs were limited to a maximum rate of tolls. Non-user would be ground of forfeiture. Their duty was to make the canal available as a means of transportation. The more it was made capacious and available, and the more fully its capacity was used, the better for consumers of coal. To enlarge its capacity, and secure the full use of such enlarged capacity, was the public motive of the plaintiffs in making the contract in question, and they performed their duty under

the contract. But defendants claim to control one half the capacity of the canal without using it, thus substantially reducing by one half the benefits to the community of a great public work.

But the canal is also private property, owned by shareholders who look to its revenues for a return upon their investments. Their interest coincides with the public interest, that the canal shall be used; yet the defendants claim the right to deprive plaintiffs of all benefit from one half of the canal, on the ground that the defendants have the exclusive right to the use of that half, while at the same time they refuse to use it as it was contemplated they should when the right was conferred upon them.

VIII.—As to the sufficiency of the pleas.

The *seventh* and *eighth* pleas (*fol.* 36) will be first considered, as the examination of them involves the same question as to the construction of the contract which has been considered in respect to the declaration.

The *seventh* plea alleges that the plaintiffs ought not to have or maintain their action, because the defendants did transport upon the canal all coal contained in boats *entering* the said canal, &c., and all coal belonging to them, &c., which entered the said canal by railroad connecting, &c.

The *eighth* plea is similar, alleging that defendants did navigate upon the plaintiffs' canal all boats used by defendants for the purpose of transporting coal *entering* the said canal, &c.

The language of the two pleas follows the language of the agreement, and their point is that the defendants sent forward by their canal all the coal that actually entered the canal. They do not meet the question whether the defendants were bound to transport by the canal, as

the declaration alleges they were, all the coal which the defendants might transport over their railroad connecting with the canal, nor deny the breach charged in the declaration that they diverted from entering the canal coal which they had brought over their railroad to the place of its connection with the canal. (*Fols.* 25, 26.) These pleas therefore simply allege that defendants transported by the canal all the coal brought over their road which they did not divert from entering the canal, in other words, that they transported by the canal all the coal they did transport by it.

If these pleas are good, it can only be because the covenant on the part of the defendants, which plaintiffs imply, cannot be implied, and if so, defendants should have demurred.

In technical language, these pleas do not traverse, nor do they confess and avoid the breach alleged in the declaration.

They are also open to the additional objection that they conclude to the country, not by a verification. If the special matter set up is not a mere denial of the breach alleged in the declaration, and these pleas assume that it is not, then it is matter affirmatively to be proved. In such case a plea to the country is improper.

The grounds of demurrer to these pleas are all specially stated (*fols.* 69, 70), and plaintiffs were consequently entitled to judgment in respect to these pleas.

As to the second Plea. (*Fols.* 27–33.) This alleges that plaintiffs ought not to have or maintain their action, because of certain negotiations between the parties prior to the execution of the agreement in question. These negotiations are set out at length, and upon them an argument was based for defendants' position that it is under the agreement entirely optional with them to use the canal or not.

The plea also traverses various matters alleged in the

declaration by way of inducement, but does not traverse the making by the defendants of the covenant and undertaking as the plaintiffs have stated it, nor the breach of such covenant. (*Fols.* 25–6.)

The demurrer to this plea is at *fols.* 66–68, and states specially all the objections that will be noticed.

(1.) If the defendants made the covenant which the plaintiffs seek to imply and are guilty of the breach stated at *fols.* 25–6, (and the allegations as to both these matters are admitted by the failure of the plea to deny them,) then whether the preliminary negotiations set out in the plea affect the construction of the contract or not, or whether the matters alleged in the declaration by way of inducement are true or not is alike immaterial. If the defendants did not make the covenant and undertaking alleged against them, they should have so alleged, and the matters stated in the plea might have been matters of evidence to sustain their allegation. If admitting their covenant they intended to plead that they had performed it, they should have denied the breach. But they neither traverse nor confess, and avoid the material allegations of the declaration. (*Fol.* 66.) This is of itself sufficient to condemn the plea.

(2.) The allegations in respect to resolutions, propositions and negotiations between the plaintiffs and the Wyoming Coal Association tender an immaterial issue. Suppose these negotiations were as alleged, they amount to nothing unless they prove that defendants did not covenant and undertake as they have admitted they did. If the argument be that by reason of these negotiations it is apparent that the plaintiffs' construction of the contract is not correct, then the allegations as to these negotiations should have been followed by a denial that the defendants covenanted and undertook as plaintiffs have alleged. Though such a plea might have been faculty

as being argumentative, it would not have been also illogical.

(3.) The declaration alleges (*fols.* 9, 10) that the privileges as to mining coal, granted to plaintiffs and defendants, by the State of Pennsylvania, had been granted among other reasons, in order that the city of New York and other parts of the State might receive a supply of coal from the State of Pennsylvania. The plea alleges that such privileges were not granted to defendants with the design that the city of New York and other parts of the State of New York might receive a supply of coal through the canal of plaintiffs. This allegation of the plea misconstrues the language of the declaration; but assume that it fairly puts in issue the statement of the declaration, to what conclusion would a verdict for the defendants on such an issue lead, that they did not make the covenant and undertaking alleged in the declaration, or that they did not break it? But they admit they have done both. So this allegation of the plea tenders an immaterial issue.

(4.) The other allegations in this plea are all open to the same objections, which are specially stated as grounds of demurrer at *fols.* 66–68.

(5.) The allegation at *fol.* 32, that the defendants did not under and in pursuance of the agreement of August 31, 1847, construct and put in operation a railroad leading from their mines, and connecting with the canal, is by way of denial to the averment in the declaration at *fol.* 23; but it is open to the objections above stated, that it is evasive and tenders an issue upon matters of legal inference. It is uncertain whether the plea intends to deny that the defendants constructed the railroad, or that it was under and in pursuance of the agreement that they constructed it.

(6.) The same remark applies to the allegation at *fol.*

32–3, that the plaintiffs did not, in reliance upon the covenants or undertakings of the defendants, enter upon the work of enlarging their canal, which is pleaded by way of denial of the averment in the declaration at *fol.* 23.

(7.) At *fol.* 24, the declaration alleges in the language of the agreement, that the plaintiffs have been at all times ready and willing to furnish the facilities of navigation, which the defendants were entitled to under the contract, to the extent of one-half the capacity of the canal. At *fol.* 25, it alleges that although the plaintiffs have reserved for the transportation of defendants' coal, one-half of the capacity of the canal, nevertheless, etc. Upon this last allegation the plea takes issue (*fol.* 33), having, by omitting to traverse the previous allegation, admitted it. It is probably a broader allegation than was necessary, but it is not necessary to consider here, what, if presented properly, this point might amount to, namely, that plaintiffs, while being ready at all times to furnish the defendants coal facilities for transportation, to the extent of one-half of the capacity of the canal, had not always reserved that capacity for the use of defendants, when they had not needed it. There is no express stipulation in the agreement to reserve, or in other words, not to use that capacity, though, of course, plaintiffs could not use it it except subject to the risk of its being needed by the defendants. It is sufficient to say here that the plea does not show, as was probably intended by this allegation, any breach of a condition precedent on the part of the plaintiffs.

(8.) This plea is double or multifarious. Without going over each of the matters pleaded, which if well pleaded ought to constitute a defence, it is sufficient to say, that the plea sets up three distinct lines of defence, to wit, matters which tend to show (*a*) that the construction of the contract contended for by the plaintiffs is not the true one, or in other words, that the defendants did

not undertake and promise, as alleged; (*b*) that the plaintiffs did not perform a condition precedent on their part, and (*c*) that the defendants did not induce the New York and Erie Railroad Company to build their branch road, or in other words, did not do what led to the diversion of the coal, were not guilty of a breach of their covenant.

The plea is clearly defective on these grounds.

(9.) But it concludes with a verification, though all the matters pleaded are by way of denial, except the allegations as to the negotiations, &c., preliminary to the contract. If these justify concluding with a verification, whereas the other matters pleaded would require a conclusion to the country, this alone is proof that the plea is faulty for duplicity.

As to the *Ninth*, *Tenth*, *Eleventh*, *Twelfth* and *Thirteenth* Pleas, (*fols.* 37–95.)

These pleas are similar in setting up in bar of the action the violation, by plaintiffs, of the provisions of the contract in relation to the rate of toll.

I. How far these provisions are conditions precedent to plaintiffs' right of action may be considered generally before examining the peculiarities of the several pleas.

The contract, as stated in the declaration, is of course admitted by these pleas to be substantially as follows:

The plaintiffs agree to furnish, at all times, to defendants, coal entering the canal by their railroad, the facilities of transportation specified in the contract, "charging and collecting a toll on the coal transported," (*fol.* 15,) to be established as therein provided. The defendants, on their part, agreed "to transport over the said canal, paying to the plaintiffs the rate of toll in the said agreement prescribed for such transportation," (*fol.* 25,) all their coal which they might transport in each and

every season over their said railroad connecting with the said canal.

(1.) It was the covenant on the part of the plaintiffs to charge tolls only according to the rule set down in the contract for ascertaining the rate, and not the performance of that covenant, which constituted the consideration of defendants' undertaking to send forward all their coal by the canal.

The rate of toll to be charged by the plaintiffs was, of course, an important element of the contract to the defendants, but as soon as the rule for ascertaining that rate was established, and plaintiffs, instead of being free to charge any rate allowed by their charter, became bound by the rule so established, as they did upon the execution of the contract, the right which the defendants thus secured, a right which they could at all times enforce, became the correlative of the obligation on their part to employ the canal.

In consideration of the permanency of the arrangement and the fixed rule which is established, the defendants agreed to transport by the canal all the coal they sent forward to it by their railroad. Any departure from the rule by the plaintiffs can be compensated in damages, and a strict adherence to it is not therefore a condition precedent to plaintiffs' right of action. In other words the covenants are independent. *Campbell* v. *Jones*, 6 *T. R.*, 570; *Stavers* v. *Curling*, 3 *Bing., N. C.* 355; *Christie* v. *Boretly*, 7 *Com. B. N. S.*, (*J. Scott,*) 561; *Tompkins* v. *Elliot*, 5 *Wend.*, 496; *Tipton* v. *Feitner*, 20 *N. Y. Rep.*, 423.

(2.) The covenant by the plaintiffs to furnish perpetually to defendants' coal the facilities of navigation prescribed by the contract, and the covenant by defendants to send all the coal that came to the canal by the railroad, are obligations of a much more extensive character than the alleged breach in the matter of tolls. From the completion of the defendants' road in 1850, down to

the time of the grievances complained of in 1863 and 1864, defendants had used the canal and plaintiffs had furnished the specified facilities of navigation and collected the prescribed tolls, all under the agreement and in accordance with its provisions. (*fol.* 25) Great advantages had therefore been already enjoyed by defendants, under the contract, and the alleged overcharge of tolls in those years did not frustrate the contract, but only affected a part of its consideration, could be readily compensated in damages, which were divisible in their own nature and by the operation of the contract, to wit, so much overcharge on so many tons transported, and therefore, according to well settled rules, a strict adherence to the rate prescribed is not a condition precedent to plaintiffs' right of action. If it be, an overcharge on one boat load of coal would be a bar to collecting tolls for the season. *See Jonassohn* v. *Young*, 4 *Best & Smith* 296; *Chanter* v. *Leesa*, 4 *M. & W.*, 295; 5 *id.* 698. *Grant* v. *Johnson*, 1 *Seld.* 247; *Bennet* v. *Pixley* 7 *Johns.*, 249.

(3.) It may be said, however, that the correct establishment on the first of May, of the rate of toll for each season (*fol.* 15,) is a condition precedent to defendants' obligation to transport their coal during that same season. But the right of defendants to use the canal each season is not dependent upon the rate of toll being established, nor therefore is their obligation. Indeed, there are two contingencies provided for when the rate cannot be established till the end of the season of navigation, the case when by the first of May, the plaintiffs shall not have sold one half of their estimated sales for the year, and the case of their not selling any at all during the season. In such cases it has been adjudged between these parties that the defendants have the right to use the canal, without paying toll as the boats pass the locks, but only paying at the end of the season as the rates shall then be determined. (29 *Barb.*, 589.) There is then no proper connection, no dependency between the obligation of the

plaintiffs to establish at the beginning of the season a correct rate of tolls, and the right and obligation of the defendants to employ the canal.

In whatever light then the case is viewed, it is apparent that the provisions for establishing in each year the rate of tolls are collateral to the permanent mutual covenants on the one part to furnish the facilities of navigation on the other to employ the canal. The tolls are payable on the coal as it passes through the canal, "at a rate per ton of 2240 pounds," (*fol.* 15,) the rate is to be established by a calculation based upon the market-price of coal, this is to be done every year, and although defendants are entitled to have it done correctly, yet a mistake in the calculations in any one year, or any overcharge of tolls would simply entail a liability for the damages caused by the error, and would not impair the general obligations of the contract.

(4.) If the matters then set up in the inducements of these several pleas be insufficient to bar the action, the traverse by the *absque hoc* of plaintiffs' averment that they were ready and willing to furnish the facilities of navigation due from them under the contract (*fols.* 38, 55, 125, 153, 1 4, 186), will not sustain the pleas. It is an elementary rule that the matter stated in the inducement must be "such as in itself amounts to a sufficient answer in substance to the last pleading," the *absque hoc* "being added merely to put that denial in a positive form, which had previously been made in an indirect one." (*Steph. on Plead.*, 183, 184.)

(5.) These objections to the pleas are available under the general demurrer, as they show the pleas bad in substance; but if not, the eighth special cause of demurrer (*fols.*73–4) covers the objection.

II.— But assuming that plaintiffs' obligation to charge a toll correctly established according to the contract be a condition precedent to defendants' obligation to transport by the canal, the five pleas in question are defective in the manner of presenting this point.

(1.) There is no connection or dependency between the special matter stated in the inducement, and the averment in the complaint traversed by the *absque hoc*.

The special traverse of a pleading by the allegation of new matter in the inducement followed by an *absque hoc*, requires that the affirmative matter should be involved in the *absque hoc*, and tend to explain it and make it specific. (*Steph. on Plead.*, 169, 175–177.)

But in these pleas, the *absque hoc* traverses the averment in the declaration (*fol.* 24), that plaintiffs have at all times been ready and willing to furnish to the boats carrying defendants' coal "all the facilities of navigation and transportation which the said canal ever afforded .... to boats owned or used by any other company or person," &c. This averment follows the language of the contract (*fol.* 15), and is an allegation of readiness to perform which the plaintiffs in their declaration have assumed to be a condition precedent on their part. But these facilities of navigation have nothing to do with the rate of tolls. Plaintiffs did not agree to charge defendants, nor did they agree to pay the rate of tolls paid by any other company or person. The facilities of navigation refer to the passage in due order through the locks, to the size of boats permitted on the canal, the speed allowed, and other matters affecting the transit of the boats. (*See Penn. Coal Co. v. Del. and Hud. Canal Co.*, 31 *N. Y. Rep.*, 91, *for an illustration.*)

A plea, therefore, by way of inducement that the plaintiffs charged tolls not warranted by the contract, or did not establish the rate in a proper time, does not warrant a traverse by *absque hoc* that they were always ready and willing to furnish the stipulated facilities of navigation.

This objection is reached by the 8th special cause of demurrer. (*Fol.* 73–4.)

(2.) The same considerations show that the pleas are bad for duplicity, for unless the defence that the plaintiffs charged tolls not warranted by the contract is involved in the defence that they did not furnish the stipulated facilities of navigation, then each of these pleas tenders two distinct issues, to wit, (*a*) whether plaintiffs were ready and willing to furnish the stipulated facilities of navigation, and (*b*) whether they exacted excessive tolls. This objection is specified in the 11th cause of demurrer (*fol.* 75) and is clearly well taken. (*Steph. on Plead.*, 251, 258.) It can only be avoided by showing that the matter which presents one issue is only pleaded by way of inducement to the other—that is by sustaining as the logic of the pleas the position: plaintiffs charged excessive tolls, *therefore* they did not furnish the same facilities of navigation they furnished to others.

(3.) The pleas are also faulty in not connecting the alleged overcharge of tolls with the coal diverted from the canal which is the subject matter of the action.

If the argument already presented, as to the bearing of plaintiffs' obligations, in respect to charging tolls, upon defendants' obligations to transport by the canal, be sound, it may be assumed that an overcharge of toll upon a single boat load of coal would not absolve the defendants from all obligations in respect to transporting coal by the canal, though such overcharge might excuse the defendants from sending forward the boat on which the overcharge was made.

The word toll in the contract imports a charge for transportation, imposed and collected at some point during the passage, and ordinarily an illegal charge of tolls would only affect the particular occasion when it was exacted. But where there is, as here, a contract for a permanent rate of tolls, the refusal of the party who col-

lects the tolls to be bound by the contract might absolve the other party from its obligations.

In this case the contract is for a rate of tolls to be established *yearly*, and to be unvarying for the season, and the theory of the five pleas is that plaintiffs established an excessive rate for the seasons of 1863 and 1864, which they gave defendants notice they should exact for all coal sent by the canal, and that therefore defendants did not send their coal.

Assuming that this would be a good answer to the declaration, the pleas do not come up to it.

The first of them, the *ninth* plea, states that in and during, and at all times throughout the season of 1863, plaintiffs exacted from defendants as a condition of their the said plaintiffs' suffering or permitting boats laden with coal for transportation upon the canal, on account of defendants, *entering* (*i. e.* which entered) the said canal by the said railroad connecting, &c., "to pass down the said canal or through the locks thereof," the payment of fifty cents per ton more than the toll specified in the agreements, and refused to permit any such boats *so laden* to pass down without the payment of such tolls. (*Fol.* 37.)

This is merely an allegation that plaintiffs charged an excessive toll upon the coal which the defendants sent by the canal, without averring that they sent any. There is no averment that they either sent, in fact, a single boat load, or that they were ready or willing to send any, but were prevented by this position of the plaintiffs.

The plea should have been that the excessive tolls were charged upon the coal alleged in the declaration to have been diverted from entering the canal, or which would be the same thing, that plaintiffs gave out and declared that they would charge such tolls upon all the coal defendants should send by the canal.

The allegations in the plea, as to the season of 1864, are precisely the same. (*Fol.* 39.)

The same criticism applies to the *tenth* plea. It differs from the ninth only in stating the overcharge to be the exaction of a toll for the boats, as well as for the coal they contained, but it speaks only of boats containing coal of defendants' entering the canal, without alleging that any such coal did enter the canal.

The *eleventh* plea also is open to the same objections. It states, in precisely the same manner, a charge of excessive tolls, as a condition of allowing any boats laden with coal of defendants entering the canal, to pass through it (*fols.* 40, 43), without stating that any such coal had entered the canal. It differs from the former pleas only in showing what it was which made the tolls charged excessive, *e. g.* including in the estimates upon which the computations were made sales of steamer coal, whereas the contract speaks of sales of lump coal, the result being an excessive rate of toll, so that there had been, and was no ascertainment according to the provisions of the said contract; but the plea does not state that this alleged excessive toll was charged on the coal diverted, nor that plaintiffs notified the defendants that it was the rate which would be charged on all coal they should send by the canal during the seasons of 1863 and 1864, respectively.

The *twelfth* and *thirteenth* pleas only differ from the eleventh in the details which led as a result of the computations to an excessive rate of toll.

The objection to these pleas that they do not connect the alleged overcharge of tolls, with the coal which defendants diverted from the canal, is stated in the 6th and 7th special causes of demurrer. (*Fols.* 72–3.)

(4.) Objections to all these five pleas of a similar character, are those stated in several ways in the 3d, 4th, and 5th causes of demurrer. (*Fols.* 71–2.)

These objections are, that the defendants do not show that it was by reason of the alleged charge of excessive

tolls that defendants diverted their coal, nor state that they were ready and willing, but for such alleged charge, to transport the coal over the canal which they diverted, nor aver that until such charge was made they did not divert their coal from entering the canal.

These objections are based on the principle, that a plea which sets up special matter by way of excuse for a breach of duty, should connect the excuse with the breach.

The pleas allege that plaintiffs ought not to maintain their action against defendants, for diverting their coal in violation of their duty to transport it by the canal, because on all the coal which they did send by the canal without alleging they sent any, plaintiffs charged an excessive toll; but to make the excuse a good one, it should appear that the defendants did send some coal, in respect to which plaintiffs took a position as to tolls, which absolved defendants from further obligation to transport by the canal.

These pleas, then, in short, are all defective in failing to allege either:

(*a.*) That the coal on which the alleged excessive tolls were charged, was the coal mentioned in the declaration as diverted;

(*b.*) That the plaintiffs notified defendants that they should exact the alleged excessive rate on all coal defendants might send by the canal;

(*c.*) That it was by reason of the alleged overcharge of tolls that defendants diverted their coal;

(*d.*) That they were ready and willing to transport by the canal but for such alleged overcharge, or

(*e.*) That until the overcharge was made they diverted no coal.

In other words, the pleas fail to connect the alleged excuse with the defendants' breach of duty. See the precedents in *Winstone* v. *Linn*, 1 *B. and C.*, 466; *Hughes* v. *Humphreys*, 6 *B. and C.*, 680; 3 *Chit. Pl.*, 1003, 1009.

(5.) In this connection, the 9th and 10th special causes of demurrer, (*fol.* 74.) suggest another view of the same subject,—the bearing upon the defendants' obligation to use the canal, of plaintiffs' duty to exact no more than the just tolls.

Suppose in May, 1863, plaintiffs established a rate of toll, fifty cents per ton more than it should be. The defendants protest, but nevertheless, use the canal. To the extent that they use it, they acquire a right of action against plaintiffs to recover back on each ton of coal sent forward, the excessive toll exacted. But, clearly, they cannot while so using it hold the plaintiffs to their obligation, unrelaxed, to reserve one-half of the capacity of the canal, with all the facilities of navigation conferred by the contract, and *at the same time*, on the plea that plaintiffs are exacting excessive tolls, withdraw a part of their business, the whole of which is the consideration for plaintiffs reserving for them the stipulated facilities. The right to recover back the excessive tolls is the equivalent for the wrong done in exacting them. But if defendants insist on the overcharge of tolls as relieving them from their obligation to use the canal exclusively, they should throw up the contract. They cannot work under it and still deny its obligations.

If A contract to sell to B on a day named, a quantity of goods at a price agreed on, if A is not ready to make delivery on the day, B may throw up the contract. But if A offer the merchandise the next day, and B accept it, he cannot refuse to pay the price on the ground it was delivered too late. His remedy would be simply for the damages caused by the delay.

Now, these 9th and 10th causes of demurrer apply in

case the pleas should be construed as sufficiently averring that defendants had sent forward some coal on which excessive tolls had been charged, wherefore they had diverted the coal mentioned in the declaration. In such case the pleas should go farther, and show that defendants had thrown up the contract, for by treating it as remaining in full force, they secure two inconsistent remedies: (1,) the right to recover back the amount paid in excess of the just tolls, which would be full compensation for the wrong done them, and (2,) the right to make this same wrong the excuse for not performing their other obligations under the contract.

The 9th and 10th causes of demurrer are, therefore, well taken if the pleas are capable of any construction which will save them as against the other objections.

(6.) As pleas by way of confession and avoidance, it has been already shown that the new matter pleaded is no answer to the action. But, if it be thought that the pleas can be sustained on account of the broad traverse of the *absque hoc*, that is mere matter of denial, and then the first special cause of demurrer (*fol.* 71,) would be well taken. *Steph. on Plead.*, 168; *Snyder* v. *Croy*, 2 *Johns*, 428.

The plaintiffs omit to argue here, whether they have in any case a right under the contract to charge a toll upon the boats, as well as upon the coal, a question raised by the *Tenth* plea, or whether the matters stated in the *Eleventh* and *Twelfth* pleas show that the rates were not properly established. The facts in reference to these matters are not stated with sufficient accuracy to justify a discussion of the questions they raise; and besides, such a discussion which would be apart from the objects of this action.

It is with confidence, then, after examining them carefully, that plaintiffs contend that all the pleas demurred to are bad, both in form and substance. They seem to have been pleaded to darken counsel, and confuse ques-

tions in themselves difficult enough. If, however, plaintiffs' construction of the agreement is the true one, if defendants are under a fair obligation to transport by the canal the product of their mines, which it was contemplated the railroad built by them would, as a connecting line, bring forward for transportation, the only real question in the case should be, whether plaintiffs have themselves so failed to live up to the contract, as to absolve the defendants from their obligations under it. The pleas do not pretend that the plaintiffs have erred, save in the matter of tolls.

But, if in any year, plaintiffs by an error in computation, or a mistake in the data, have established too high a toll, defendants have their remedy by recoupment or a cross-action. To punish a slight overcharge of tolls by denying to plaintiffs all remedy under the contract, while defendants are enjoying all its advantages, would be indeed punishment, not compensation. In any case, to hold one obligation of a contract which does not go to the root of the consideration, to be a condition precedent to all relief, works the most inequitable results, and the Courts shrink from such a construction, unless the language of the contract clearly requires it. (*Lowber* v. *Bangs*, 2 *Wall. U. S. Rep.*, 728; *Tipton* v. *Feitner*, 20 *N. Y.*, 423.) That there is nothing in the language of this contract, or in the spirit of arrangement which requires such a construction, it is believed has been fully shown.

Upon the whole case the plaintiffs in error ask for a judgment reversing that of the Court below, and sustaining the demurrers to the pleas.

E. H. Owen,
S. P. Nash,
Of Counsel.

SUPREME COURT

OF THE UNITED STATES.

The Pennsylvania Coal Company,

ads.

The President, &c., of the Delaware and Hudson Canal Company.

BRIEF AND POINTS

FOR

DEFENDANTS IN ERROR.

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SUPREME COURT

OF THE UNITED STATES.

THE PENNSYLVANIA COAL COMPANY,
Defendants in Error,

ads.

THE PRESIDENT, MANAGERS, and COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY,
Plaintiffs in Error.

Brief and Points of Defendants in Error.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action of covenant brought by The Delaware and Hudson Canal Company against the Pennsylvania Coal Company, upon an indenture made between those two companies, dated August 13, 1851, (pages 11–12), whereby The Pennsylvania Coal Company, was *put in the place of* an unincorporated joint stock company called The Wyoming Coal Association, under an agreement between that association and the Canal Company, dated August 31, 1847 (pages 13 to 22), and assumed all the obligations of the Wyoming Coal Asso-

ciation under that agreement, the Pennsylvania Coal Company having succeeded to all the rights and interests of the Wyoming Coal Association.

This original agreement is one providing for *the use of the canal at a certain scale of tolls*, for transportation of coal which might enter it from a railroad then contemplated to be constructed, connecting with the canal at a given point.

A railroad so connecting was afterwards constructed by the defendants, and large quantities of coal entering the canal from it were, year by year, transported under the agreement.

The plaintiffs now claim that the agreement contains a *covenant by implication*, though confessedly there is none expressed, that all coal which shall come over the railroad to the point where it connects with the canal, shall be sent down the canal and subjected to the prescribed tolls; and the breach alleged is that the defendants, having induced the Erie Railroad Company to build a branch road connecting with their railroad at the point where it connects with the plaintiffs' canal, diverted from the canal and transported to market by the Erie railroad, in the years 1863 and 1864, a large quantity of coal which had been brought over the defendant's railroad to its point of connection with the canal, and thereby deprived the plaintiffs of canal tolls to the extent of nine hundred thousand dollars.

The declaration sets forth at large the indenture which the plaintiffs claim to contain in legal effect this implied covenant, and seeks to support or give ground for the implication of such a covenant by the averment of certain extrinsic facts which are supposed to bear upon the ascertainment of the intention of the parties to the indenture.

The defendants, though conceiving it to be quite clear that upon the case as thus presented by the plaintiffs there was shown no implied covenant and no foundation

whatever for their claim, yet chose, in view of the very large amount involved, that the question of construction of the contract should be presented for decision upon a more correct and complete view of the case than the declaration affords: and with this view they pleaded the second plea (pages 27 to 33), which, while negativing certain of the plaintiffs' allegations of extrinsic facts from which they seek to deduce the implied covenant, brings before the Court, at full length, certain documents referred to and partially recited in the contract, which bear upon the ascertainment of the intent of the parties in respect of the point now in dispute.

We suppose it to be too plain for discussion (and it was in fact conceded by the plaintiffs upon the argument below) that the reference which the contract makes to these documents, makes them in legal effect part of its recitals as fully as if, after the reference to them by date and description, they had been set forth *in hæc verba*. The object of the second plea was to put them upon the record as if they had been so set forth, so that in construing the operative clauses of the agreement, the Court might have the benefit of all the light which is thrown upon their meaning by *all* the recitals; a result accomplished in accordance with the pleader's design, by means of the demurrer which the plea necessarily provoked, the consequent testing of the sufficiency of the declaration, in order to determine who had committed the first fault in pleading, and the presentation to the Court, in this form (rather unusual, but seeming to be the only method possible under the form of pleading which the plaintiffs had adopted) of the question whether upon the *entire contract*, as it is set forth in the declaration and plea the alleged implied covenant is raised.

The defendants also pleaded certain other pleas, setting up the defence that the plaintiffs, at the time of the alleged diversion, refused to permit the defendants to transport any coal on the canal unless the defendants would pay higher tolls than prescribed by the contract, and so, in legal effect (assuming the implied covenant to

exist as claimed), that the plaintiffs *prevented the defendants from performing according to the contract.*

The plaintiffs demurred to these several pleas, and upon the argument of the demurrers the chief subject of discussion was the sufficiency of the declaration and the existence of the alleged covenant by implication.

The Circuit Court held that the agreement contains no such covenant, either express or implied, as the plaintiffs claim; that the declaration is radically defective in showing no cause of action whatever—and consequently gave judgment for the defendants upon all the demurrers.

For the reversal of this judgment the plaintiffs bring this writ of error.

DEFENDANTS' POINTS.

First.—It is indisputable that the indenture contains no *expressed agreement* of the defendants to transport upon the canal all their coal, or any particular quantity or portion of it. The instrument contains no *language* to that effect, or *anything like it*, or *tending towards it.*

The plaintiffs' claim rests wholly upon the notion that a covenant to such effect is raised by *implication of law.*

Strictly speaking, there are no implied covenants in law save those which arise according to fixed legal rules, by the use in instruments of a certain character, of certain words, which when thus used, have a *fixed technical signification*, beyond their natural or ordinary meaning; or which by fixed rules import a particular obligation, or have a specific legal result—as where the word "give" is used in a deed, or "grant" or "demise" in a lease—or those which by fixed legal rules result from particular acts or relations.

Com. Dig. Tit. Covenant, A. 4.

But it is settled law, that as well in construing an agreement under seal, as in construing one not sealed, the Court will have regard to the real intent and meaning of the parties as ascertained from the entire instrument, and by reference to the circumstances attending the making of it, (so far as reference can properly be made to such surrounding circumstances without violation of the rules relating to the variation of writings by parol evidence), and that wherever the language of the writing leaves in doubt its meaning upon the particular point, it shall be so construed, *in so far as the language will possibly permit*, as to effectuate the real intent and meaning thus ascertained.

In the application of this principle of construction, it is held, that where the language of an instrument expresses imperfectly or obscurely an obligation, which it plainly appears to the Court, the party intended thereby to assume, *his obscure or imperfect language shall be construed to impose upon him the obligation which he intended it should impose upon him;* and in some cases, this principle of supplying defects or imperfections in the language used in an instrument for the purpose of *expressing* or *defining* an obligation intended to be assumed by it, has doubtless been pushed pretty far—sometimes, perhaps, unwarrantably so.

Where a party has been held bound to an undertaking or obligation under a sealed instrument which was thus obscurely or imperfectly expressed upon its face, the case is sometimes spoken of as one of implied covenant; but it is submitted that the expression applied to such a case is an inaccurate one. We take note of its inaccuracy, because its use tends to *misleading ideas* as to the extent to which the practice of supplying defects in language may be legitimately carried.

We think that upon a critical examination of the cases in which parties have been held subject to the obligation of a covenant, not in terms expressed in the instrument (exceping the cases of technical words which import a covenant in law), they will all be found to rest upon this

principle of construing the language to effectuate the intent with which it appears to have been used; if any case be found going beyond the due application of this principle, we submit that it is not good law.

Perdage vs. Cole, 1 Saund., 319, i.
Duke of St. Albans vs. Ellis, 16 East., 352.
Randall vs. Lynch, 12 East., 179.
Earl of Shrewsbury vs. Guild, 2 Barn. & Ald., 489.
Rhodes vs. Bullard, 7 East., 116.
Gerrard vs. Clifton, 7 Term Rep., 676.
Clifton vs. Walmesley, 5 Term Rep., 64.
Seddon vs. Senate, 13 East., 63, Op. of Lord Ellenborough, p. 74.
Lyell vs. Newark Lime and Cement Manufacturing Co., New York Court of Appeals Cases, March Term, 1862.

If the question raised by the plaintiffs upon this agreement, is to be determined by reference to this standard, the plaintiffs must inevitably fail.

This instrument contains no language having *any reference whatever* to any such stipulation on the defendants' part, as is now claimed to exist. There is no *language* which either party, *however careless or illiterate*, could have supposed to bear any such meaning, or which could have been used with any *idea* of expressing or defining any such obligation on the defendants' part. And surely a Court has no warrant for charging the defendants with such a covenant as is here alleged, not because they have ever made it or ever intended to make it, but upon the ground of its being a covenant which it would have been reasonable for them to make.

Second.—The plaintiffs have seen fit to aver in their declaration, (page 10), that when the contract was made, there was no means existing or then contemplated, by which our coal, after being brought over the railroad,

could be sent to market, except by sending it over their canal. And it would appear that the plaintiffs proceed upon the theory that when the contract was made, the parties supposed *that the force of circumstances* would assure to the plaintiffs the transportation of our coal, if the railroad were once built—that we would have to send it over the canal because we could send it nowhere else —*that therefore they forebore to obtain or ask from us any agreement so to send it;* that by the change of circumstances their then reliance has failed them; and that for their relief the Court are now *to incorporate into the agreement by way of implied covenant, a stipulation which at the time was not intended or deemed necessary.*

Can any thing be plainer than that a Court possesses no such power?

If in the making of a sealed instrument, even a covenant which the parties *intended to insert* in it, be *left out*, through forgetfulness, inadvertance or mistake, a Court of common law cannot, upon the clearest evidence of the intention and mistake, supply the omission. The only remedy is by bill in equity to reform the contract.

A fortiori, where there is *no intention* to insert the supposed covenant—where the parties designedly omit to make or exact it, or to bargain concerning it, because they believe no occasion for its application will ever arise, it is impossible for a Court of law, upon a change of circumstances occurring, to put into the indenture what the parties designedly left out of it. The relief in such a case, if to be found anywhere, would be by application to a Court of Equity for *relief against* the contract, or respecting its subject matter, but even that Court would have no power to insert in the contract a positive covenant or obligation which the parties designedly omitted.

The question here is, *not* whether the defendants *intended or expected to transport* over the canal all the coal which they should bring over the railroad, but, did they *intend, by this instrument, to covenant* that they would so transport? When their seal was put to it, did they

understand that *it did contain* such a covenant? Did the plaintiffs so understand? If the plaintiffs claim to answer this question in the affirmative, we challenge them to point out the clause which *any one could have imagined* to contain such a covenant.

Third.—But even if a court were at liberty to speculate upon the question, whether if the present contingency had been foreseen, and the plaintiffs had asked from us such a covenant, we would have given it, and upon arriving at the conclusion that we would have done so, to now make such a covenant for us; how is such a question of "hypothetical past willingness upon an unthought of contingency" to be determined?

What entitles a court to pronounce, that if we had foreseen the discovery or opening up of a cheaper or more advantageous mode of getting our coal to market, we would have bound ourselves to forego its advantages? Why should it be supposed that we would voluntarily have assumed a position of disadvantage, which would subject us to be undersold in the market by all our competitors, and perhaps wholly ruin our business?

And if the Court is now to undertake to put itself in our place, as at the time of making this contract; to foresee in imagination the opening of the Erie Railroad, and its adaptedness for transporting to market the coal of the region where are our coal mines, and the consequent presentation to us of a choice between it and the use of the Delaware and Hudson Canal, upon the terms prescribed by this contract; and now to choose for us as it may imagine we would then have chosen; ought not the Court in fairness, also to foresee in imagination, the other important event which has occurred in connection with the subject matter, viz.: the enormous increase in the cost of producing our coal and transporting it to market, which reduces to a mere illusion the allowance of $2.50 per ton, which by the terms of this contract, is made to us out of the proceeds of the coal, to reimburse

us for its cost, before making the contracted equal division of profits with the plaintiffs, so that the contracted scale of division gives to the plaintiffs, instead of half the profits, more than the entire nett proceeds, and makes the continuance of business under the contract, *utterly ruinous to the defendants.* And in assuming the office of choosing for us, must not the Court choose, as we would have chosen, upon foreseeing *all* the future?

Fourth.—Most, if not all, of the cases in which courts have so construed the language of an instrument as to amount to a covenant not distinctly expressed upon its face, have arisen upon agreements, brief in their terms, and loosely and inartificially drawn, and in the preparation of which it was manifest that no considerable time or care had been bestowed.

The instrument now under consideration is drawn with most elaborate care. The stipulation on each side, with the considerations moving the parties to enter into them, are artistically expressed in very full detail, and each party's covenants contained in a separate portion of the indenture: and the design is plainly apparent that whatever was intended to be agreed to at all, should be *expressed at large* in unmistakable language, and not left to inference.

Yet the instrument contains *not one word* which can be supposed to have been *inserted for the purpose, or with the idea* of expressing any undertaking on the defendants' part, of the nature of that with which they are now sought to be charged.

If, upon an instrument thus planned and drawn, the Court should hold the defendants chargeable with such an undertaking as the plaintiffs claim, it would not be *construction* of the instrument actually executed, but the mere interpolation, by the will of the Court, of a covenant which was not at all in the minds of the parties.

Fifth.—Where an instrument contains an express stipulation or covenant, upon a particular subject matter, the

implication of further covenants upon the same subject matter is excluded.

Noke's Case, 4 *Coke*, 50.
Kent v. Welch, 7 *Johns. R.*, 258.
Whallon v. Kauffman, 19 *Johns. R.*, 97, *and cases there cited.*

The contract in question contains an express covenant by the defendants, in relation to the construction of the railroad which would naturally supply coal for transportation on the canal under the contract (page 22), which covenant is cautiously drawn, and manifestly goes as far as the defendants chose to go, in respect of an engagement to furnish coal for transportation, or having that tendency. That *in this respect* the contract was intended to be, and was by its draftsman felt to be, of a very one sided character, is manifest not merely by the caution thus used, but by the great care which is evidently taken to *make out*, by recitals, and by reference to investments made or to be made, on faith of the plaintiffs' engagement, a consideration adequate to uphold the positive obligation upon the plaintiffs, unsupported by reciprocal obligations on the other side.

Sixth.—The enormous rise, during the last few years, in the cost of producing coal and carrying it to tide water, makes the rate of toll prescribed by this contract substantially prohibitory. The scheme of the contract is (page 15) the division between the parties, in equal shares, of the selling price of the coal, after first reserving to the defendants $2.50 per ton, to cover the probable cost of the coal to them; this sum of $2.50 per ton being at the time of the contract estimated by the parties as the probable future cost (page 31), and being assumed for all the purpose of the contract as the amount of such cost, without any provision for its subsequent variation. At this time the selling price of the coal appears to have ranged from about $3.15 to $3.75 per ton (page 28), which, on the scale of division prescribed

by the contract, would give to the plaintiffs a toll ranging from about 32½ to 62½ cents per ton, the defendants netting a like sum per ton as their share of the surplus of selling price over cost, to compensate them for their investment of capital in the enterprise, and to form their sole source of profit.

With the change of times the cost of production has increased enormously—more than double—and of course the selling price has risen correspondingly.

The contract has no flexibility. The defendants have to pay out the whole of the increased cost, and after deducting its actual amount from the actual selling price, there would be a handsome surplus for equal division. But they cannot divide in that way. The contract gives to the plaintiffs one half *the surplus of the present selling price over the old cost* of $2.50, and thus obliges the defendants to pay to them, as their half of an imaginary surplus, much more than the entire real surplus. In one year the toll thus demandable from the defendants, instead of a sum of from 32½ to 62½ cents per ton, as contemplated, has been as high as $3.37 per ton; and if the plaintiffs' present claim were sustained, the amount recoverable against the defendants for tolls on the coal which, up to the present time, they have transported over the Erie Railroad, would amount to not less than from *seven to eight millions of dollars.*

If the plaintiffs' assumption of an implied covenant be sustained, the result is plain. The plaintiffs do not and cannot pretend that the contract *actually obliges the defendants to transport* even a single ton of coal over this canal; the claim is merely that it *restrains them* from sending coal to market by any other route.

The result of sustaining the plaintiffs' view, therefore, would be merely to compel the defendants *to abandon the business—except* that they would now be obliged to pay the plaintiffs seven or eight millions of dollars, by way of damages for not having abandoned it six years ago.

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And the real *gravamen* of the complaint, is *not* the

failure to transport over the canal, any quantity of coal which the defendants had agreed to transport over it, but their having transported coal over the Erie Railway in violation of an alleged restriction against so doing.

The claim is for *an implied covenant in restraint of trade*, which would certainly be a novelty in the law.

Seventh.—The implied covenant which is alleged, is sought to be raised upon the ground that, without it, the contract lacks such mutuality of obligation as fairness absolutely requires, and as the parties must necessarily have intended to stipulate for. The plaintiffs' notion seems to be, that there is a specific and defined subject matter, "the defendants' coal," which the plaintiffs agreed to receive for transportation, and which the defendants (impliedly) agreed to furnish; and that thus "the defendants' coal" has become, as it were, appropriated or irrevocably destined to transportation over this canal, and subjected to the payment of the stipulated toll.

A careful examination of the positive stipulations of the contract will show that these ideas of the plaintiffs are completely mistaken. The *affirmative stipulations are entirely inconsistent with mutuality* or reciprocity of obligation, *upon the question of what coal shall enter the canal to be transported* under the contract. That point is expressly at the defendants' option, subject only to the prescribed limitations. But *after the coal enters the canal*, that is to say as to all coal which actually becomes subject to this contract, there is *complete mutuality of obligation*. The plaintiffs are bound to permit it to be transported, and the defendants are bound to pay the toll upon it.

By the contract (page 15) the plaintiffs covenant to allow the passage over their canal, upon payment of the stipulated toll, of boats of four classes, viz.:

1st. Boats owned or used by the defendants, for the purpose of transporting coal, entering the canal by rail-

road connecting with it at or near the mouth of the Wallenpaupack River; *or*,

2nd. Boats containing coal (so entering), belonging to the defendants, or transported by them or on their account; *or*,

3rd. Boats containing coal (so entering), in which the defendants may be in any manner interested; *or*,

4th. Boats containing coal (so entering), *the transportation of which, under the agreement, the defendants may authorize or require.*

These are the only provisions of the contract specifying what coal is to be transported; and with reference to them it must be observed:

1. The subject matter provided for, is, *not* "the defendants coal," nor coal mined from *any particular coal lands.* It cannot be pretended that the coal lands which the defendants may have owned at the time of the contract, or those which they have since acquired, are in any way subservient to this agreement; nor that the defendants are restricted from sending to any market they may choose, *by any route other than this*, the products of their coal lands. And, on the other hand, the defendants *may require the transportation of coal* belonging to them, brought to the canal by the connecting railroad, *though it may not have been mined from their own lands.*

2. The only limitation of the source from which the coal is to be presented for transportation is this, viz.: that it must enter the canal "by railroad" connecting with it at or near the mouth of the Wallenpaupack River. There may be one railroad, or several, so connecting. The possibility of there being more than one appears to have been contemplated (see beginning of

page 14), and the contract covers coal brought by any such "railroad or railroads."

3. The only point "*fastened*," in reference to the railroad, is its terminus at, or connection with the canal. From such point it may run in any direction, and for any distance more or less. It may be so located at first as to reach one or more sources of coal supply, and, should it afterwards become desirable, either from the working out or exhaustion of the first sources of supply, or for any other reason, the road may be extended, or branches may be added to it, so as to reach other coal lands: or an entirely new road may be built, provided only that it must connect with the canal at the designated point.

The railroad need not be constructed by, nor belong to, the defendants, or the Wyoming Coal Association. The contract apparently *did not contemplate* that the Coal Company should construct or own the railroad. Its covenant was, *not* that it would construct a railroad, but that "it would use all its influence to cause the speedy construction of a railroad from the coal lands owned by said association to the Delaware and Hudson Canal at or near the mouth of the Wallenpaupack river," (page 22) and, in the sequel, the *railroad was not built by* "The Wyoming Coal Association," the covenantor, but by the Pennsylvania Coal Company, then *an independent corporation*, at the request of the Wyoming Coal Association (page 11.)

It is true that the interests of these two companies were afterwards consolidated, the Pennsylvania Coal Company having bought out the Wyoming Coal Association, and succeeded to both their rights and liabilities under the contract in question; *but this uniting of those two companies is an accidental circumstance, which neither enlarges nor diminishes the scope of this contract, nor varies its construction.*

The covenant of the Pennsylvania Coal Company on which this suit is brought (pages 11, 12,) merely puts it in place of the Wyoming Coal Association under the

contract, with precisely the obligations which the Wyoming Coal Association was before subject to, and with an express provision that the agreement of assumption shall not "vary, alter the effect of, or give construction to" the original agreement. And this case must be determined *exactly as if it were an action against the Wyoming Coal Association, while the railroad still belonged to the Pennsylvania Coal Company.*

5. To entitle the coal to transportation upon the canal under the contract, it needs not that the defendants should own or be in any wise interested in it. It is sufficient that it be coal entering the canal by railroad connecting at the point named, and that the defendants require or demand its transportation under the contract.

The fourth class, above referred to, is plainly intended to provide for and require such transportation, upon the defendants demand, and of course at their pure option, of *coal* (brought to the canal by the contemplated railroad), *which does not belong to the defendants and in which they have no interest;* and it is *only* for coal thus circumstanced that the fourth class is intended; because all coal which the defendants own, or are "in any manner interested in" *is completely provided for in the three preceding classes.*

6. These four classes are named and provided for in the *disjunctive*. In respect to each class the plaintiffs' obligation is several and complete.

If the defendants have mined out all their own lands, or find the working of them unprofitable, and therefore, or from any cause, choose to stop or suspend their own coal business, or to reduce it to a very small amount, it will not be denied that they have a right to do so; nor, we suppose, will it be denied that they have a right to send the coal, mined from their lands, to some other market than that reached by this route, or to send it to mar-

ket by some route of which neither this railroad nor canal forms part.

But in any such case, while business of the first three classes provided for by this contract is thus suspended or terminated, the obligation of the plaintiffs, in respect of the fourth class remains perfect. They are bound to allow the transportation on the canal, of all coal (entering the canal as specified), *belonging to others than the defendants*, which the defendants may require them so to allow.

The amount of this business may be much, or little, or nothing. It may extend to the *entire quantity* of coal, to which the defendants' right of transportation under the contract is limited, and of course it may vary from time to time indefinitely. But whatever may be its amount, it is plain that the option in respect of it, subject only to the prescribed limitation of its totality, is purely in the defendants, as between them and the plaintiffs.

It is so by the express language of the contract. It must be so in the nature of things; for the coal belongs to others, who have an absolute right to bring it over the railroad, as a public highway, and when it has reached the terminus of the railroad, to send it where they choose. The defendants have no control over its destination or route, save as they may be able from time to time to arrange with the owners; and it will certainly not be pretended that the plaintiffs would have any claim against the defendants by reason of *such* coal being sent to market by the Erie Railroad.

7. It is thus plain that the contract, by positive and unmistakable stipulations, gives to the defendants, the optional rights, not only to transport for their own account as little or as much coal (within the prescribed limit) as they may choose, but also to farm out to others, at their uncontrolled pleasure, the privileges of transportation which are granted to them, in respect of coal brought to the canal by the railroad, the construction of which they were to procure.

The purpose and the reasonableness of this latter privilege are apparent.

The object in view was to induce or persuade capitalists to build a railroad striking the canal at the point named, and extending to undeveloped coal fields which might be within reasonable reach.

The contract recites (end of page 13 and beginning of page 14,) that "the Canal Company were aware that no "company could prudently undertake to construct a rail-"road connecting with the said canal without a certainty "of being allowed to transport on the said canal, at a "permanent rate of tolls," and that they had, therefore, "'for the purpose of creating motive and inducement "for capitalists to invest their funds in the construction "of a railroad or railroads to be connected with the "canal of this company, at or near the mouth of the "Wallenpaupack River,' offered a tariff of tolls, &c."

The Canal Company were to *use their influence* to "cause such railroad to be constructed," *i. e.*, to persuade the capitalists to build it (page 22). The coal business or transportation of the projected railroad, would not be limited to the coal of The Wyoming Coal Company; their coal might be a large or a small proportion of the entire quantity brought over the road; and in order to furnish adequate inducement for the desired investment of capital, it was necessary that the Canal Company should be placed in such position as that they could be compelled to allow the transportation over their canal, at the stipulated toll, of *any coal*, brought to it by the contemplated road, which *any one* might desire to have so transported.

Therefore, the Coal Company take this covenant, to be used in the future as might be found desirable, on behalf of any or all future transporters of coal over the contemplated railroad, under such arrangement as might be made between them and these covenantees, or the capitalists whom they might induce to construct the railroad.

If, at the time of this contract, the capitalists of whom

the parties were in search had been found, and the contemplated railroad company had been then in existence, the contract would probably have been made directly with such railroad company; and, in view of the intentions and expectations of the parties at that time, as they appear from this contract and its recitals, there is no reason to doubt that it would have been substantially in the shape of a covenant by the plaintiffs with the railroad company, that they would allow any and all persons who might bring coal to their canal for transportation, which had been transported to it by such railroad, to transport such coal upon the canal, upon payment of the rate of toll stipulated. But, of course, *there would not, and could not, have been any stipulation on the part of the railroad company that the owners of the coal which might be brought over their road should send it to market via this canal.*

No one would say that such a contract between the canal company and the railroad company was unfair or unreasonable. Such lack of mutuality as is found in it, would be recognized by all as naturally incident to the subject matter involved. And a careful and thorough examination of the actual contract made between these parties shows that it comes to substantially the like result, (as doubtless the parties intended it should,) as would have been arrived at, if the railroad company had been then in existence and the contract had been made directly with it.

Eighth.—As it must certainly be admitted that the defendants have the right to send to market the coal mined from their coal lands, by an entirely new and independent route, not embracing either the canal or the railroad to which this contract refers, the plaintiffs are called upon to define *what circumstance it is*, that irrevocably *fastens* coal to the route of this canal, so that it may not be sent to market by another avenue.

We have seen that the mere fact that it has been transported over the railroad cannot so fasten it; for, for all

purposes of the contract, it needs not that the railroad should belong to, or be under the control of the defendants, nor need the coal presented for transportation belong to the defendants, or be coal in any wise subject to their control anterior to its being so presented. The plaintiffs must, therefore, be driven to contend that when coal mined from the defendants' lands is transported over the railroad referred to by the contract, it becomes, by such combination of circumstances, fastened to the canal.

In order to test whether such a proposition can have any foundation in sense or reason, or in the intent of the parties, let us consider what may or may not indisputably be done by the defendants, consistently with any supposed rights of the plaintiffs.

Suppose the length of the railroad, from the defendants' coal lands to the point of connection with the canal, to be fifty miles. It is admitted that the defendants, upon mining out a given quantity of coal, may send it to market by a wholly different route, not using at all this fifty miles of road. Then suppose the new railroad, by which they wish to send it, connects with their own road at a point thirty miles from their mines, and of course twenty miles from the canal. Will the plaintiffs say that that they may not carry the coal over this thirty miles of their own road? That because of this contract, instead of doing so, they must build for the purpose another road alongside, and let this one lie idle? Will they so claim, even when it is recollected that by the contract the railroad to which it refers was not required to be of any particular length, or upon any particular route (the only thing requisite being that it should connect with the canal at or near the mouth of the Wallenpaupack River), and that, therefore, the thirty miles of road proposed to be shut up, or excluded from use, was not at all called for by the original contract, and may perhaps be an extension of the original railroad, built after the mining out or exhaustion of the coal lands situate within the first twenty miles from the canal?

Then assuming that this upper thirty miles of the railroad may, without violation of the plaintiff's rights, be made use of for the transportation of coal to the Erie Railroad, why may not forty miles, or forty-nine miles, or the whole fifty miles, be used in like manner? Where *does this contract require* the line between use and non-use to be drawn?

Again,—supposing that after the bringing of the defendant's coal to the point where the railroad connects with the canal, there is required 100,000 tons of coal yearly for the supply of iron works located at the village which has been built up at this point of connection, and that another 50,000 tons of coal per year is required to supply fuel to the Erie Railroad; will it be pretended that by reason of this contract the defendants are forbidden to furnish from their coal such supplies to the iron works and the railroad, and must send all their coal down the canal to tide water?

Again,—what, in the plaintiff's theory, is the "implied covenant" of the defendants in respect of coal coming over the rail road during the half of the year in which canal navigation is suspended? Must it be piled up to await the resumption of navigation? What, in relation to coal arriving at the connecting point towards the close of the season, when it is a matter of doubt whether coal sent by the canal will be frozen in or not?

And if, in answer to these questions, the plaintiffs undertake to say that the defendants may lawfully send their coal by the Erie Railroad during the six months in which the canal is closed, but may not do so during the six months in which it is open, shall the Court be asked to shut its eyes to the fact that from economic reasons and in view of the competition of other coal producers, such a system of business would be substantially impracticable, because it would require the very heavy and expensive equipment of cars and locomotives and the force of employees requisite for doing the coal business of these defendants on the railroad to be kept idle for half the year, while on all competing lines of railroad the coal transportation is continuous for the entire year?

We might suggest further queries, illustrating the difficulty, and indeed impossibility, of determining under circumstances quite likely to arise, the rights and obligations of the parties, upon the plaintiff's theory of an implied covenant. But we think enough has been said to show how utterly baseless is the idea of there being any such implied covenant, and that the difficulty in answering the queries supposed, springs purely from the fact that the contract *contains nothing whatever relative to the subject matter to which the queries relate*, viz., a supposed obligation of the defendants to send their coal down the canal.

Ninth.—In the position which the plaintiffs occupy by the plain language of this contract, of complete obligation on their side to receive and transport (or allow to be transported), with no corresponding obligation on the other side to furnish for transportation; *there is nothing unreasonable or anomalous.*

It is merely *the position of* all common carriers, and all *proprietors of highways*, or public routes of travel or transportation.

The plaintiffs' canal is a public highway, and *without any contract at all*, the defendants would have *as complete right to transport coal* upon it as they now have; the sole purpose of the contract, and its sole effect, is to *reduce the rate of toll* which the plaintiffs would otherwise have been entitled to charge; and in respect of the transportation business to be conducted *at such reduced rate, it merely places the parties in like relation, and under like obligations as already existed, in respect of transportation at the statute rate* of toll.

The recitals of the contract show that a large proportion of the canal's capacity was lying unused and wholly unproductive to the plaintiffs; that the statute rate of toll was too high to invite business, and the plaintiffs must either reduce it, or let their canal remain, to a great extent, unoccupied.

They therefore conclude to reduce it, and fix by the

contract, a rate of toll satisfactory to themselves, one at which they will be glad to receive whatever business may offer, be it more or less, up to the extent of the then unused capacity; and they merely commit themselves to the rate of toll, thus reduced by contract, under like conditions and with like effect as if the reduction had been made by statute, passed at their own request, in order to invite the construction of a railroad through the wilderness, adjacent to their canal, to the end of building up a new business for their advantage.

Tenth.—That the *plaintiffs deliberately contemplated*, and proposed to themselves to occupy, *this position of one-sided obligations* in respect of transportation, at the reduced rate of toll, of coal brought to their canal by the contemplated railroad, *is shown, beyond peradventure*, by a careful examination of the recitals of the contract as set forth in the declaration and the second plea.

From these it appears that the contract grew out of certain resolutions passed by the Canal Company, April 28, 1847, proposing to theacceptance of "any who might avail themselves of the same," a permanent tariff of tolls on all coal entering the canal by railroad connecting with it at the point named. (Page 14.) That thereupon the Wyoming Coal Association entered into negotiations with them, proposing modifications of this tariff, and after conferences between the two companies, the Canal Company made a further proposition, by resolution of July 15, 1847, to which, subsequently, more definite and complete provisions were added; the whole resulting in the bargain which is evidenced by the written agreement. (Page 14; pages 30, 31–2.)

Upon referring to the resolutions of April 28, 1847, (pages 27–8–9), which form the ground work of the whole arrangement, we find,

1. That the tariff, thus originally proposed by the plaintiffs, was upon a sliding scale, dependent upon the price of the coal, to be determined on the 1st May in

each year, the general features of it resembling the provisions of this contract. The adjustment of proportions between price and toll is made upon a different plan, which, as events have turned, would have been vastly more favorable to the defendants than the plan of this contract. (Page 28.)

2. The resolution contemplated, as does the contract, a probable future enlargement of the canal, and provided, in like manner, for the increase of toll in that event, proportioned to the reduction in the freight or cost of transportation, produced by such enlargement. (Pages 28–9.)

3. The tariff thus proposed was to be permanent or perpetual (Page 28.)

4. *These resolutions* are proposed by the plaintiffs, *as the sole basis upon which capitalists shall rely* in constructing the proposed railroad, or railroads. *No other contract or engagement of either party is provided for or contemplated.* The resolutions are to stand as the engagement of the Canal Company, to and in favor of *all whom it may concern*, and are to operate as a contract *in præsenti.*

"The foregoing tariff" * * * "*is hereby* approved and adopted, and the *faith of the Company is hereby pledged* for the observance of the same." (Page 29.)

And it is expressly declared that the tariff is "offered *to create motive and inducement* for capitalists *to invest* their funds in the construction of a railroad, or railroads, to be connected," &c.

If the defendants, instead of negotiating for a modification of this tariff, had accepted it as it was first offered, and relying merely upon the plaintiffs' obligation created by the resolutions, had constructed the railroad, *the plaintiffs would have been as completely bound to them as they now are*, to allow them to transport coal upon the canal at a rate of toll reduced from the statute rate,

dependent upon the price of the coal—and one more favorable, in fact, to the defendants than the rate prescribed by this contract.

Where then would the plaintiffs have looked for the "implied covenant" to furnish coal for transportation? They would have been met by the primary difficulty of there being *no covenantor.*

Eleventh.—The idea put forth in the declaration that this contract contains an obligation on the plaintiffs "to reserve one-half the capacity of the canal for the defendants' use," is without foundation

The granting clause of the agreement, which is the only *affirmative* provision in it, *binding the plaintiffs* in respect of the extent of the coal transportation to be permitted by them under it, merely secures to the defendants, in respect of boats of the four specified classes, *the like facilities of* navigation and transportation as the canal affords to *boats owned or used by any other company or persons, or to the plaintiffs own boats* (*page* 15), upon payment by the defendants of the stipulated toll.

The *right of user* at the reduced toll, which is thus given to the defendants by contract, is, in its extent, *exactly identical with their common law right of user at the statute rate of toll.*

It is, in extent, precisely the like right of user as would have been possessed by the defendants and by all others, under the resolutions of April 28, 1847, if a railroad or railroads had been constructed upon the faith of those resolutions without any further contract.

We challenge the plaintiffs to point out *any difference whatever* between the defendants' right of user under the contract, and the right of user which they would have possessed without any contract, save in the *single point* of the *amount of toll* chargeable.

The stipulation of the contract from which this obligation to reserve one half the capacity of the canal for the defendants' use is alleged to result (*page* 17), *is not, and does not purport to be an affirmative covenant of the*

plaintiffs, but is merely a *restriction* upon and *limitation of* the right of user previously granted; and the provision is, simply, that the plaintiffs shall not be bound to allow the defendants to transport *under the contract, i. e.*, at the reduced toll provided for, a quantity of coal exceeding that specified. *If they exceed such quantity, they are liable to the statute toll on the excess.* This was the sole purpose of the provision (*see page* 31); "this stipulated toll shall not be extended beyond 400,000 tons in any one year," and is its sole effect.

Surely this mere provision of *restriction* upon the defendants as to the amount of coal upon which they shall be entitled to claim the benefit of the reduction in toll, cannot be so construed as to give them any *preference in user* over other transporters on this public highway, when the granting-clause or provision in chief, which is thus merely restricted as to quantity, expressly puts them on the same level with all other transporters in respect of transportation facilities and right of user.

And there is not even a shadow of ground for so construing this proviso, as to enlarge the defendants' right of user under the granting clause.

Twelfth.—And even if the plaintiffs had undertaken to grant to the defendants the exclusive use of one-half the capacity of the canal, in disparagement of the rights of other transporters, whether of coal or other articles, such grant would have been void in law.

Commonwealth vs. *D. & H. Canal Co. & Pa. Coal Co.*, 43 *Penn. R.*, 295, *Op. p.* 302.

Beekman vs. *Sar. & Schen. R. R. Co.*, 3 *Paige*, 45.

Thirteenth.—Thus it is seen that the pretended hardship upon the plaintiffs of being obliged, in virtue of this contract, to *keep one half the capacity* of their canal *unused by themselves or others*, awaiting the defendants'

use, while the defendants may use it as much or as little as they please, has *no real foundation.*

And if there were such a difficulty pressing upon the plaintiffs, the raising this implied covenant of the defendants' to send over the canal all the coal which they send to market at all, would not obviate the difficulty: because the defendants would still have the undisputed right to send to market as much or as little coal as they should choose, and to vary the amounts from time to time indefinitely, within the prescribed limit of totality. And in view of the peculiar effect of the application of the prescribed scale of tolls where the cost of production of coal is greatly in excess of the sum of $2 50 per ton, assumed in the contract, the defendants would be compelled to limit the quantity sent over the canal, in times of high prices for coal, just as they now do, the only difference being, that instead of sending to market what they now send by the Erie Railroad they would have to leave that quantity of coal unmined. Great as might be the injury of this course to the defendants it could do the plaintiffs no good, unless it might be incidentally, by raising the price of the article of coal, in which the plaintiffs are dealers, by subtracting from the market the million tons per year which the defendants supply to the public through the Erie road; and the plaintiffs will hardly ask the Court to interpolate a clause in this contract in view of such a consideration and for such a purpose.

Fourteenth.—The provision of the contract looking to a probable future enlargement of the canal, does not affect the case, or weaken the effect of any of the propositions above asserted.

1st. The plaintiffs did not at all bind themselves to enlarge.

2nd. It is recited that the enlargement might probably be found desirable for the purpose of reducing the cost of the transportation, which the plaintiffs were then

carrying on, without reference to the creation of an enlarged capacity for transportation, and that such enlarged capacity would result incidentally from the enlargement undertaken for the first named purpose, (page 13.)

3rd. The like element, of probable future enlargement, is found in the resolutions of April 28th, 1847, by which the plaintiffs proposed to bind themselves completely, without binding any one else to anything.

Fifteenth.—The idea was suggested by one of the plaintiff's counsel upon the argument in the Circuit Court, that so long as the railroad remains connected with the canal, the defendants are absolutely obliged to send down the canal all the coal which is transported over the railroad, but that they may at any time discharge themselves from such obligation by *breaking the connection*—or taking up the rails from that part of the railroad which runs to the canal.

If that suggestion be repeated here and be at all relied upon by the plaintiffs—besides the two obvious answers to it;

1. That as we have before argued, and we trust, demonstrated, the contract contains no such implied covenant or obligation as the plaintiffs allege, and

2. That if it does, it certainly contains nothing authorizing the defendants at their volition thus to rid themselves of the obligation; we submit that any possible effect of the suggestion is effectually disposed of by these two plain propositions, viz.:

1. The parties making the contract, viz.: The Wyoming Coal Association, were not the parties constructing or owning the railroad, nor did the contract contemplate that they should construct or own it, inasmuch as their covenant was to "use their influence to induce

other capitalists to build it" Therefore, as they neither made nor could break the connection of the railroad with the canal, such a mode of terminating the obligation could never have been in the minds of the parties. It is merely a fanciful suggestion of ingenious counsel. As before observed, this suit must be regarded exactly as if it were brought against The Wyoming Coal Association, while the railroad still belonged to the Pennsylvania Coal Co., an independent corporation.

2. The railroad having been (it must be presumed) built under a charter, locating its terminus at the Delaware and Hudson canal, *became a public highway*, which persons desiring to transport property to the canal had an absolute right to use for that purpose, and after it thus became a highway, *its owners* could not lawfully destroy it or deprive the public of the right thus to use it, by breaking the connection. An attempt so to do would be summarily restrained at the suit of the Attorney General of Pennsylvania.

Upon the grounds set forth in the preceding points, it is submitted, that the plaintiffs' claim is built up purely upon a fallacy; that there is no such implied covenant as they allege; and that judgment was rightly given for the defendants upon all the demurrers, by reason of the radical insufficiency of the declaration.

We proceed to consider briefly the questions arising upon the pleas, though it seems hardly worth while to do so.

Sixteenth.—The second plea is not double; though we are aware that upon a hasty glance, one might very naturally suppose it to be subject to that defect.

It does not allege several defences, but several matters converging to one point, and going to make up the single defence that the defendants did not make the implied covenant which is alleged against them.

The issue to be tried is: Did the defendants so covenant?

The plaintiffs have not chosen to allege in express terms, as they might have done, that the defendants covenanted to transport all their coal over the canal, and pay the toll upon it; leaving the defendants to plead *non est factum*, and test the legal effect of the contract, when it is offered in evidence in support of such allegation.

Nor have they chosen to rely upon setting out the contract *in hæc verba*. Besides so setting it out, they allege a series of extrinsic facts, for the purpose of giving construction to it—of raising the implication which they claim.

Unless these allegations are to be regarded as simply impertinent, we have certainly a right to traverse them, which can only be done by plea. And, assuming them to be material, as there is a series of allegations, which, taken together, are claimed to establish the single point that we made the implied covenant, we must traverse them all in one plea. If there be ten such allegations, and we traverse them by ten separate pleas, each directed to one of the allegations, the pleas might all be bad; because each plea would admit the truth of the nine allegations not traversed by it.

The remaining matters of the second plea go also to make up the *same single point of defence*, viz., that we did not make the implied covenant which is alleged.

These remaining matters are simply the presentation to the Court, at length, *in hæc verba*, of documents which are recited in the contract by their date, with a statement of their general scope and effect. The recitals of a contract may always be referred to, for the purpose of giving construction to the operative clauses, and indeed that is usually the chief purpose of their insertion. And where the construction of an operative clause is fairly in doubt upon its language, the recitals often determine the question. It will hardly be denied that these documents

which are set out at large in the second plea, form, in legal effect, a part of the recitals of the contract, and may be referred to in aid of its construction as fully as if they were set out at large in the contract, in lieu of such recital of them as it contains.

If they aid in the construction of the contract, and determine the point in question in our favor, we have the right to bring them before the Court, in order to have the contract correctly construed; and under the form of pleading which the plaintiffs have adopted, the defendants' only mode of taking advantage of them, appears to be by putting them upon the record by plea. They are properly united with the other matters of the plea, because the denial of the extrinsic facts (resting in parol), which the plaintiffs allege, and the allegation of these documents for completing the Court's view of the entire contract, all taken together, go to make up the one defence, that the defendants did not assume the obligation alleged against them.

The plea properly concludes with a verification, because our allegation of these documents is new matter which the plaintiffs are entitled to traverse.

Seventeenth.—The seventh and eighth pleas are affirmative allegations of performance by the defendants of their covenant in respect of transporting coal upon the canal and paying the toll upon it. If we are right in our construction of the contract, they show full performance of all the defendants contracted for. The validity of the pleas depends, doubtless, upon the construction given to the contract.

Eighteenth.—The ninth plea sets up a perfect defence, viz.: that the plaintiffs *at all times* during the season of 1863, and 1864, *refused to allow the defendants to transport any coal* upon the canal, unless the defendants would first pay them a toll for such transportation, exceeding the rate which the contract prescribed. This certainly is equivalent to a refusal by the plaintiffs to

perform themselves, or to permit the defendants to perform, *according to the contract.* How, in the face of this, the plaintiffs can sue the defendants for not performing, we leave it to them to explain.

From the assignment of causes of demurrer to this plea, it would seem that the plaintiffs suppose it to be pleaded upon the notion, of setting up a breach by the plaintiffs of their covenant, as a justification for our breach of ours.

It proceeds upon no ground so untenable as this would be, in a case of independent covenants.

The plaintiffs sue us for not transporting, as, (assuming us to have made the implied covenant,) we have agreed to do. They allege, as it was necessary they should, that they were ready and willing to allow us to transport. We traverse this readiness and willingness, by a plea correctly drawn with affirmative allegations, in the ancient form of the special traverse, *absque hoc*, alleging that they refused to allow us to transport, and prevented us from transporting, unless we would first pay them a sum of money to which they had no right; and, as clearly we were not bound to submit to any such exaction, their conduct amounted in legal effect to absolute refusal and prevention. As new matter is set up, which the plaintiffs are entitled to traverse, the plea correctly concludes with a verification, and so are the ancient precedents.

Chitty Pl., 621.
Steph. Pl., 182.
1 Saund., 103 6.

Nineteenth.—The tenth plea is sustained upon the same principle as the ninth. The exaction by the plaintiffs of a toll upon the boat, in addition to the stipulated toll upon the coal transported, is in plain violation of the contract, which, in granting to the defendants the right of using the canal by the boats engaged in their coal transportation, and prescribing the compensation to be

paid for such use, necessarily negatives the right to exact any other compensation.

Twentieth.—The eleventh plea is sustained upon the same principle as the ninth. It has been finally settled, in a litigation between these parties in the State Courts, that, under the contract, the plaintiffs have no right to exact prepayment of toll, as a condition of allowing the boats to pass, unless the amount of such toll has been fixed and determined under the contract, so as to be then presently due and payable.

By the terms of the contract (pages 15, 16) the rate of toll for each year is to be established in a manner specified, and, of course, until thus established, its payment is not demandable. Then it is provided that, in order to such establishment, in each year, the quantity of the Canal Company's sales up to May 1, of their coal to arrive by the canal during the year, and the average price at which such sales have been contracted, *shall be ascertained*, and the rate of toll is to be deduced, by a specified process, from such average price thus "ascertained."

The principle of this plea is, that the defendants are at least entitled to participate in this "ascertainment," in the result of which they have so vital an interest. It alleges that the subject matter of inquiry and ascertainment was wholly within the plaintiffs' knowledge and wholly without the defendants'; the sales from which the average was to be ascertained were very numerous, to divers parties, at varying prices and on varying conditions; and all the contracts, documents and accounts, in the exclusive possession of the plaintiffs, and the defendants were wholly ignorant in respect to them; that the plaintiffs, although requested, wholly refused to allow the defendants to see any of the accounts or papers, or to give to them any information upon the points of inquiry, and that thus the plaintiffs prevented the "ascertainment," which the contract provides for, of the average price of the sales; that so, the

toll was not established, nor its payment demandable; and the requisition of the plaintiffs that the defendants, before their boats should be permitted to pass down the canal, should pay the sum which the plaintiffs fixed as the amount of toll, was in substance a refusal by the plaintiffs to allow the defendants to transport their coal under the contract.

Twenty first.—The twelfth plea is sustained upon the like principle as the ninth. The plaintiffs attempted enhancement of the rate of toll demandable, by the means which it sets forth, viz., altering the accustomed course of business, with reference to which the contract was entered into, by shaping the contracts for sale of coal in large quantities at the lower prices, so as to make the coal deliverable elsewhere than at Rondout, and thus making up the average price upon the basis of the coal sold in small lots at the higher prices—is a fraudulent device and evasion which cannot be justified.

Twenty-Second.—The thirteenth plea is sustained upon the same principle as the ninth. In the case of the Pa. Coal Co. *vs.* Del. & Hud. Canal Co., 29 Barbour's N. Y. Reports, p. 589, affirmed in Court of Appeals, September Term, 1863, the point was settled, that where the Canal Company's contracts, made up to May 1 in a given year, for sale of coal to arrive during the year, are of less extent than half the estimated sales for the year, the toll is not demandable until its amount is ascertained at the close of the year upon the average of all the sales; and the estimate to be made for this purpose on 1st May, of the extent of the year's sales, must of course be a real and not a pretended estimate. The plea shows a refusal by the plaintiffs to permit the transportation of coal by the defendants, unless they would first submit to the exaction of a payment, which, under the law as thus set-

tled, was not legally demandable by them; which is equivalent to an absolute refusal by the plaintiffs to allow transportation under the contract.

CHAS. F. SOUTHMAYD,
WM. M. EVARTS,
Of Counsel for Defts. in Error.

Supreme Court of the United States.

THE PENNSYLVANIA COAL COMPANY,
Defendant in Error,
vs.
THE PRESIDENT, &c., OF THE DELAWARE AND HUDSON CANAL COMPANY,
Plaintiffs in Error.
} No. 170.

Opinion of Mr. JUSTICE NELSON in the court below:

We have carefully examined the contract entered into between the plaintiffs and the Wyoming Coal Association, on the 31st of August, 1847, the latter company being now represented by the defendants, The Pennsylvania Coal Company, and are of opinion that it contains no covenant, express or implied, on the part of the defendants, that they would transport on the canal of plaintiffs all the coal brought over the railroad of defendants connecting with the canal, and which they are sending forward to market. We think the resolution fixing a permanent rate of tolls, and which was carried into the agreement, together with the maximum limit as to the quantity of coal to be carried on the canal, in respect to which the plaintiffs entered into obligations with the defendants, was entered into by way of encouraging the latter to build the contemplated railroad from their mines to the canal; and that the plaintiffs relied on the prospective advantages from this investment, and transportation of coal on the road to their canal, as affording full consideration and compensation for the obligations entered into. No doubt it was not then within the minds of either party that this road might or would be used advantageously except in the transportation of the defendants' coal to market by the use of the

plaintiffs' canal; and that the progress of improvements in the construction of railroads would or might afford a diversion of the coal from that channel of conveyance. And hence no covenant was required to bind the defendants exclusively to the use of that channel. The only covenant on the part of the defendants that seems to have been required, is the one at the close of the agreement. The Wyoming Coal Association promise and agree, to and with the plaintiffs, to use all their influence to cause a speedy construction of the railroad, and that unless constructed within three years, the plaintiffs be at liberty to declare the agreement null and void.

The recitals in the agreement furnish very strong evidence of the intent of the plaintiffs on entering into it.

The resolution adopted by the company, on the 28th April, 1847, recites, that they did, for the purpose of creating a motive and inducement to capitalists to invest their funds in the construction of a railroad to be connected with the canal, offer to the acceptance of any persons who might avail themselves of the same a permanent tariff of tolls on all coal entering said canal by any such railroad. The principal negotiations between the parties related to the rate of these tolls. There is no covenant that the defendants shall bring a bushel of coal to the canal, or that they shall take from the coal mine any particular quantity; nor that all the coal *mined or carried on the railroad shall be transported on the canal;* which latter clause is now sought to be interpolated by implication into the contract. We think if such had been the intent of the parties it would have been expressed, and that it would be making a contract for them to insert it, instead of construing the one made.

We have not looked into the pleadings beyond the declaration. The first fault is there, and fatal to the suit. Judgment for the defendants on the demurrers.